

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In Re:)
)
THE FINANCIAL OVERSIGHT AND)
MANAGEMENT BOARD FOR PUERTO RICO,)
)
as representatives of) No. 17 BK 3283-LTS
)
THE COMMONWEALTH OF PUERTO RICO,)
et al,)
)
Debtors)
-----) Pages 1 - 100
)
THE BANK OF NEW YORK MELLON,)
)
Plaintiff)
)
v.) Adv. Proc.
) No. 17-133-LTS in
PUERTO RICO SALES TAX FINANCING) 17 BK 3284-LTS
CORPORTION (COFINA), et al,)
)
Defendants)

HEARING

BEFORE THE HONORABLE JUDITH GAIL DEIN
UNITED STATES MAGISTRATE JUDGE

United States District Court
1 Courthouse Way, Courtroom 18
Boston, Massachusetts 02210
July 5, 2017, 10:43 a.m.

LEE A. MARZILLI and KELLY MORTELLITE
OFFICIAL COURT REPORTERS
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
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A P P E A R A N C E S:

SUSHEEL KIRPALANI, ESQ., Quinn Emanuel Urquhart & Sullivan, for COFINA Senior Bondholders' Coalition.

RAFAEL ESCALERA, ESQ., Reichard & Escalera, for COFINA Senior Bondholders' Coalition.

BRANT DUNCAN KUEHN, ESQ., Quinn Emanuel Urquhart & Sullivan, for COFINA Senior Bondholders' Coalition.

ANDREW M. LEBLANC, ESQ. and GRANT R. MAINLAND, ESQ., Milbank Tweed Hadley & McCloy, for Ambac Assurance Corporation.

DAVID M. SCHLECKER, ESQ. and C. NEIL GRAY, ESQ., Reed Smith, for Bank of New York Mellon.

SALVATORE A. ROMANELLO, ESQ. and JARED R. FRIEDMAN, ESQ., Weil Gotshal & Manges, for National Public Finance Guarantee Corporation.

LUC A. DESPINS, ESQ., Paul Hastings, LLP, for Official Committee of Unsecured Creditors of the Commonwealth of Puerto Rico.

KENNETH R. DAVID, ESQ., Kasowitz Benson Torres, for the Whitebox Funds.

MR. RANDALL OPPENHEIMER, ESQ., PETER FRIEDMANN, ESQ., and DANIEL L. CANTOR, ESQ., O'Melveny & Myers, for the Non-Debtor Governmental Actors.

ELLEN M. HALSTEAD, ESQ., Cadwalader Wickersham & Taft, for Municipal Corp.

TIMOTHY W. MUNGOVAN, ESQ., Proskauer Rose, for the Financial Oversight and Management Board for Puerto Rico (FOMB).

P R O C E E D I N G S

THE CLERK: You may be seated. The United States District Court for the District of Puerto Rico is now in session. The United States Magistrate Judge Judith Gail Dein is presiding in Massachusetts in the matters of In Re: The Financial Oversight and Management Board for Puerto Rico, as representative of the Commonwealth of Puerto Rico, et al, Bankruptcy No. 17-3283-LTS, and also in the matter of In re: The Financial Oversight and Management Board for Puerto Rico, as representatives of Puerto Rico Sales Tax Financing Corporation, also known as COFINA, Bankruptcy No. 17-3284-LTS, and also in the matter of the Bank of New York Mellon as Trustee Plaintiff v. Puerto Rico Sales Tax Financing Corporation, COFINA, et al, Adversary Proceeding 17-133-LTS.

THE COURT: Good morning, everyone. Welcome to the latest location for sitting of the Court of Puerto Rico, and welcome to those who are listening in various locations.

I hope everybody is here ready to work today, all right, because I have all your pleadings. I know you had a nice relaxing weekend -- I did not -- but I've been through all of it, but now we're getting down to some real work on some real cases that need to be resolved. The summary judgment deadlines are real, these are real disputes, and we're going to need to figure out how to get from here to

1 there in a short amount of time.

2 I think, just scheduling things, we're going to
3 break at 12:00 to 1:00 for lunch to accommodate the schedule
4 in Puerto Rico. I ask everybody to talk in their
5 microphones, and it's probably easiest, at least at the
6 beginning, to use the podium, and then we'll see. And I
7 will ask my standard discovery question: Has everybody
8 resolved all their disputes over the weekend? And I see no
9 one raising their hands. I do see a lot of laughter.

10 Okay, so I think it makes the most sense for me,
11 actually, to start with the bank's dispute with the COFINA
12 Senior Bondholders' Coalition, and just, as usual, identify
13 yourself when you speak.

14 MR. KIRPALANI: Thank you, your Honor. Nice to
15 see you again. Susheel Kirpalani of Quinn Emanuel Urquhart
16 & Sullivan on behalf of the COFINA Seniors Bondholder
17 Coalition.

18 THE COURT: And wait. Who's from the bank?

19 MR. SCHLECKER: Your Honor, David Schlecker from
20 the law firm Reed Smith representing the Bank of New York
21 Mellon.

22 THE COURT: Okay, do you want to go first?

23 MR. SCHLECKER: I think it makes more sense.

24 THE COURT: Let me hear from him first.

25 MR. SCHLECKER: Thank you, your Honor. The

1 discovery motion that the Bank of New York Mellon has -- and
2 just let me say at the outset that we have been successful
3 in resolving all discovery disputes with all other parties
4 except for the Senior Bondholder Coalition, and the
5 discovery dispute that we have with them is very specific
6 and straightforward.

7 THE COURT: So does that mean Ambac has been
8 resolved?

9 MR. SCHLECKER: Yes, your Honor. As of just, I
10 think it was yesterday, last night, the dispute with Ambac
11 has been resolved, which leaves only one dispute.

12 THE COURT: All right, I'm one for one. Go.

13 MR. SCHLECKER: The dispute concerns the
14 Coalition's refusal to produce documents in its possession
15 that pertain to the Whitebox entities, et al. They simply
16 refuse to do so on the grounds that we perhaps should be
17 able to get those documents from Whitebox itself directly.

18 The other aspect of the dispute concerns our
19 request that the Senior Bondholder Coalition turn over
20 documents relating to Ambac, another defendant in this case.
21 The Coalition, however, has taken the position that it would
22 only produce Ambac documents from May 1, 2017, to date; in
23 other words, from two months ago to date. The reason they
24 claim not to produce Ambac documents is because they believe
25 that the only relevant dispute concerns the events of May 1,

1 2017, and therefore they're not willing to produce documents
2 prior to that time pertaining to Ambac.

3 Your Honor, in terms of these arguments, we've
4 cited cases to the Court in terms of how it is perfectly
5 appropriate to request similar documents from different
6 parties in this case. Indeed, doing so insures that we get
7 a fulsome production with respect to the Whitebox documents
8 as well as the Ambac documents. With respect to --

9 THE COURT: But let me ask, did you go directly to
10 Whitebox? Have you received documents from them?

11 MR. SCHLECKER: Well, we certainly have requested
12 documents from Whitebox. They have responded, but we have
13 resolved any dispute we have with Whitebox. We haven't seen
14 their production yet, and we hope that it's all there is,
15 but we don't know for sure.

16 THE COURT: And you've agreed on parameters with
17 them?

18 MR. SCHLECKER: Oh, yes, yes.

19 THE COURT: Okay. And so you're seeking the same
20 types of documents through the Coalition?

21 MR. SCHLECKER: Yes. What we're seeking is
22 certainly the communications between members of the
23 Coalition and Whitebox, communications between the members
24 of the Senior Bondholder Coalition and Ambac, as well as,
25 you know, whatever other documents that might pertain to the

1 requests that we have provided, the document requests that
2 we have served on them. And we do believe -- we're
3 producing documents from January 1 of 2015 to date. We
4 think it's appropriate for the Senior Bondholder Coalition
5 to do a search that spans that period of time, particularly
6 since other defendants, including Whitebox and Ambac, they
7 have taken the position that events going as far back as
8 2015 are relevant to these proceedings.

9 THE COURT: So that's one of the issues that we're
10 going to need to resolve today is sort of how far back it
11 goes for everyone. Let me deal with them separately,
12 though. On the repeat documents, is what you're asking for,
13 do you expect the Coalition to produce documents from other
14 members of the Coalition besides Whitebox for these Whitebox
15 communications? Is that the issue?

16 MR. SCHLECKER: Well, we're expecting them to
17 produce the documents -- the members of the Coalition should
18 produce documents in their possession to the extent that
19 there are communications between those members and Whitebox,
20 between those members and Ambac, and obviously among
21 themselves that pertain to the particular requests.

22 THE COURT: Okay. And for the timing, I recognize
23 that you've agreed to produce back to 2015, but I'm actually
24 not sure that's the right scope, so let me make that clear.
25 But I'm assuming that you don't really care, provided that

1 it's uniform.

2 MR. SCHLECKER: Correct, your Honor. I mean, all
3 I can say is, other parties have claimed that events
4 starting as far back as 2015 are relevant and have sought
5 discovery from Bank of New York Mellon as well as other
6 parties, and therefore, you know, whether it's relevant is
7 not for our determination obviously. It's ultimately the
8 Court's determination as to what constitutes documents that
9 will eventually be heard and relevant, but we're prepared to
10 do that.

11 THE COURT: The bank itself didn't take the
12 position that 2015 events or 2016 events constituted events
13 of default?

14 MR. SCHLECKER: That's correct. Indeed, we
15 certainly did not take that position.

16 THE COURT: Okay.

17 MR. SCHLECKER: Thank you.

18 THE COURT: Now...

19 MR. KIRPALANI: Thank you, your Honor. Again,
20 Susheel Kirpalani for the record on behalf of the COFINA
21 Senior Bondholder Coalition. My colleague, Brant Kuehn, is
22 going to address the discovery disputes today, and my
23 cocounsel from Puerto Rico would like to have some one-minute
24 opportunity to address the Court on just some Puerto Rico
25 transparency issues that are germane really to our motion,

1 not this motion. But to try to address, I want to
2 contextualize what the Bank of New York's position is with
3 respect to our Coalition before Mr. Kuehn can address the
4 specifics of our position on the discovery because your
5 Honor is maybe a bit new to this. I'm sure you had a very
6 busy weekend reading and catching up, but with respect to
7 Bank of New York's position, the COFINA Senior Bondholder
8 Coalition began in the spring of 2015 with a handful of
9 holders holding a couple hundred million dollars of COFINA
10 senior bonds. Today we're eleven institutions, asset
11 managers, with over \$100 billion of assets, so just to give
12 you a sense of scale of how large these institutions are.
13 Among them -- and we hold in excess of or approximately
14 \$2.5 billion of the COFINA senior bonds. Among the eleven
15 institutions is Whitebox, and our Coalition works with other
16 senior bondholder representatives like Ambac and National
17 trying to coordinate efforts and things of that nature.

18 For purposes of the Bank of New York litigation,
19 this piece of the Title III case, Whitebox is separately
20 represented by counsel, and our Coalition disagrees with
21 some of the things that Whitebox has advanced in terms of
22 issues in dispute. And so what the Bank of New York I think
23 may be confusing is, the remaining ten institutions who do
24 not take certain positions are willing to provide discovery
25 on the positions that we are taking, which are germane to

1 the event of default in this phase of the litigation; but
2 beyond that is a scope issue that in fairness and in
3 proportionality to the other ten institutions that we
4 represent who have internal counsel, regulatory counsel,
5 their own computer servers to search, it's just a huge
6 burden. But if I could defer to Mr. Kuehn on the specifics
7 of the back-and-forth with Mr. -- I think it's Schlecker on
8 behalf of the Bank of New York, I think that might be
9 illuminating.

10 THE COURT: All right, I don't need all of your
11 details of how you've communicated this, all right, back and
12 forth. I do need to know sort of where you are, and I need
13 to understand, given that there are these ten other
14 institutions, is it your understanding that you would be
15 producing communications from each one of them, or is there
16 a central organization that sort of gets copied on
17 everything?

18 MR. KUEHN: Your Honor, Brant Kuehn. There is no
19 central organization that's copied on all of these emails.
20 As such, we need to search the emails of each of the
21 clients. I just want to put something in context here, and
22 that is that the Coalition has already agreed to run a
23 substantial list of search terms across documents in
24 response to the Bank of New York's request for the more
25 limited time frame that we have agreed upon. So the dispute

1 is really only about these narrow two terms, which
2 Mr. Kirpalani has already explained the additional burden.

3 The other point I would like to make is that what
4 we're talking about here is Phase 2 of the litigation,
5 Phase 2 of this proceeding; and I'm sure you're well aware
6 that the issues in Phase 2 are whether there has been an
7 event of default, whether that has been cured, and whether
8 the bonds can be accelerated. In addition, there's Phase 3
9 that's coming in the future which relates to whether Bank of
10 New York should have accelerated, should have declared an
11 event of default earlier. It's my position that the
12 documents that the Bank of New York seeks with respect to
13 the Ambac communications and the Whitebox communications
14 really relate at their heart to Phase 3 and not to Phase 2.

15 THE COURT: Because of the timing or because of
16 the content?

17 MR. KUEHN: Because of the content. An event of
18 default occurs based on what the government parties do, not
19 based on what the creditors do. So to the extent that we're
20 discussing whether there's been an event of default and we
21 need to litigate that, what's relevant are documents that
22 are created and come from the government parties.

23 THE COURT: But presumably he's asked you for
24 documents that say: Have you discussed this? What's your
25 position on, has there been a default in 2017? I assume

1 that the event of default that's being discussed are sort of
2 this failure to defend and otherwise safeguard these assets.

3 MR. KUEHN: Correct. And with respect to the
4 documents dated from May 1, 2017, to date, which we believe
5 are the key documents for the purposes of Phase 2, we have
6 agreed to produce those. The issue is the earlier time
7 frames.

8 THE COURT: All right, so tell me why May 1 as
9 opposed to January 1, 2017, in the 2017 context. I
10 understand the 2015, 2016, and we'll talk about that in the
11 context of the other motions, but why May 1?

12 MR. KUEHN: That was the result of negotiation
13 with the Bank of New York, who agreed on that date with us.
14 The date was selected because, again, our position is that
15 creditor documents --

16 THE COURT: I truly have never been told to be
17 louder, never ever.

18 MR. KUEHN: Our position is that creditor
19 documents have limited relevance to the questions of whether
20 there's been an event of default, but out of a good-faith
21 effort to come to an agreement with Bank of New York, again,
22 we agreed to produce substantial documents from a later
23 date, which is the events of default that we believe are
24 most relevant. And once those events of default had been
25 noticed, that's where we believe that creditor documents

1 could become more relevant. And, again, that date was one
2 that the Bank of New York agreed to with respect to every
3 other search term and every other document request other
4 than Ambac and Whitebox documents. And, again, those are
5 the two parties that have filed lawsuits against Bank of New
6 York, which we believe is why those documents are relevant
7 to Phase 3, the question of Bank of New York's potential
8 liability, not the question of whether there's been an event
9 of default.

10 THE COURT: All right. And what about the claim
11 that they're repetitive or they get them straight from
12 Whitebox?

13 MR. KUEHN: That really comes down to
14 proportionality. I would agree that it is not a de facto
15 rule that simply because you can obtain documents from one
16 party you can't obtain them from another. That's really not
17 the core of why we think it's unnecessary to produce those
18 documents. It's just part of the analysis of why we think
19 it's not proportional.

20 THE COURT: But you are running the search terms,
21 so I don't have anything here that says adding the Whitebox
22 search term substantially increases the burden.

23 MR. KUEHN: It's simply a matter of the additional
24 date range.

25 THE COURT: Okay, so we're focusing on the date

1 range, not on the --

2 MR. KUEHN: Correct.

3 THE COURT: Okay. All right, do you want to be
4 heard on just the date range?

5 MR. SCHLECKER: Sure. Shall I do it from here?

6 THE COURT: Yes, and you can remain seated if
7 you --

8 MR. SCHLECKER: Thank you, your Honor. Just very
9 briefly, with respect to the date range, I will read to you
10 the scheduling order that was put in place in this case.
11 The very first paragraph specifically states, "The following
12 deadlines shall apply to the stage of this adversary
13 proceeding in which the Court will determine the parties'
14 respective interests in the disputed funds, including
15 whether, and if so when, an event of default occurred on
16 government resolution."

17 The fact that Judge Swain indicated when, not just
18 whether, to me indicates that it is quite unclear as to
19 whether she believes that events prior to May 1, 2017, are
20 at issue. And I think it's not appropriate for the Senior
21 Bondholder Coalition to unilaterally say that because they
22 take the position that it's only as of May 1, 2017, is the
23 relevant date, that that's all they're going to search, and
24 especially since we know that other parties in this case
25 have taken the position that facts prior to that are

1 absolutely in dispute and at issue in this Phase 2 proceeding.

2 THE COURT: So this is the question that I have,
3 and maybe you can help me with it. It seems to me we need
4 to limit in this Phase 2 the events of default that we're
5 talking about because otherwise we will never get to summary
6 judgment, so let's make that clear. It also seems to me
7 that if there is an event of default in 2017, then that is
8 critical; and whether there were other events of default
9 earlier may relate to the bank's failure or decision not to
10 call an event of default, but as far as the allocation of
11 funds isn't going to matter. I mean, the 2017 is really the
12 core issue.

13 What I don't get a sense of is whether there's a
14 difference between sort of January 1, 2017, or March 30,
15 2017, you know, the fiscal plan. Is that the critical date?
16 Does it make sense to go back to January 1, 2017, sort of
17 for everything here? The May I don't really understand.

18 MR. SCHLECKER: Your Honor, certainly the Bank of
19 New York doesn't take the position that anything prior to
20 May 1 or May 4 of 2017 has any bearing at all on any of
21 these matters.

22 THE COURT: Okay.

23 MR. SCHLECKER: So if your Honor wants to get
24 clarification as to why the earlier date ought to be
25 appropriate in terms of Phase 2, I really suggest that some

1 of the other parties need to be involved in the discussion.

2 THE COURT: All right, so why don't --

3 MR. SCHLECKER: Specifically Whitebox and Ambac.

4 THE COURT: All right, I don't want them to talk
5 yet.

6 MR. SCHLECKER: Okay.

7 THE COURT: Do you want to respond?

8 MR. KUEHN: I suppose I can speak here?

9 THE COURT: Yes.

10 MR. KUEHN: Your Honor, if it would simplify the
11 proceeding, I think that we would agree to produce the
12 Ambac- and Whitebox-related documents going back to a date
13 before May 1, and we think that the appropriate date, if
14 we're working on these date issues, for the creditor
15 production, for our production, could be the date that the
16 fiscal plan was announced, which would be in March, 2017.

17 THE COURT: Let's do that.

18 MR. KUEHN: Thank you.

19 THE COURT: All right, so as I understand it,
20 there's really no question of this duplicative issue. That
21 seems to have faded away. So for Ambac and Whitebox, you'll
22 go back to -- what did I say, March 13?

23 MR. KUEHN: Sure, March 13.

24 THE COURT: 2017, okay? Am I two for two? There
25 you go.

1 All right, so then I guess we're up to the Senior
2 Bondholders' requests. Who's doing that?

3 MR. KUEHN: Your Honor, at root, the government
4 parties' refusal to produce documents in response to the
5 COFINA senior parties' request is really just an attempt to
6 relitigate the Court's June 6 discovery order setting the
7 scope of discovery or setting the process for resolving the
8 issues in this Phase 2 of the interpleader action. On
9 June 1 and June 2, the government parties submitted motions
10 to the Court asking the Court to avoid discovery altogether
11 and simply move directly to dispositive motions, arguing
12 that the question of whether there had been an event of
13 default, which is the key portion of Phase 2 of this
14 litigation, could be decided exclusively on public
15 documents. Obviously four days later the Court decided that
16 that wasn't the case and ordered document discovery as well
17 as depositions.

18 In order to justify the refusal to produce
19 documents, the government parties have offered several
20 excuses or several reasons why they think it's not
21 necessary: First, they've argued that the documents that
22 the COFINA senior parties have requested are not relevant.
23 That's simply not the case, and I'll explain why. Second,
24 they've argued that the documents the COFINA senior parties
25 have sought are privileged, particularly under the

1 deliberative process privilege. Again, we believe that is
2 not the case, and I will explain why. And, third, they have
3 refused entirely to produce any electronically stored
4 information, emails, text messages, anything. They've also
5 refused to produce any sort of log of those documents with
6 respect to the documents they claim are privileged.

7 So if I may, I'd like to go through those three
8 issues. First off, with respect to relevance, again, my
9 position is that the Court has already decided that
10 documents beyond publicly available materials are relevant
11 to this proceeding, and that's why the Court ordered
12 discovery.

13 THE COURT: All right, but help me out here.
14 You've made the statement that the government parties have
15 put their intent at issue, and they may turn around and say,
16 "No, we haven't." Flesh that out for me.

17 MR. KUEHN: Sure, absolutely. So the government
18 parties have made an argument in their briefing, in
19 particular on Monday, that there's no ambiguity about the
20 resolution, and I would agree with that; and obviously we're
21 not seeking documents related to the meaning of the
22 contract, the drafting of the resolution. What is ambiguous
23 is what the government acts mean with respect to their
24 obligations under the resolution. And what I'm getting at
25 is that there have been several acts, in particular over the

1 last six months, which indicate that the government parties
2 do actually intend to take COFINA's dedicated sales tax from
3 COFINA, which is clearly a violation of the covenants in the
4 resolution. However, those acts are ambiguous.

5 On March 13, of course, the government parties
6 proposed and approved a fiscal plan which mathematically
7 indicates that they intend to take COFINA's dedicated sales
8 tax and use it for other purposes, simply by virtue of the
9 fact that it doesn't allow enough debt service to cover even
10 COFINA's dedicated sales tax for the year 2018, amongst
11 other years. Now, again, the document itself doesn't
12 specifically say, "We're taking COFINA's dedicated sales
13 tax," but it's clearly the implication.

14 Later, one of the government parties, Mr. Elias
15 Sanchez, who is the representative of the Oversight Board,
16 or the representative of the Commonwealth for the Oversight
17 Board, stated publicly that the intent of the fiscal plan
18 was to pool all the resources, including COFINA's dedicated
19 sales tax, which, again, we take the position is not within
20 their control. It's not within the hands of the
21 Commonwealth. They've indicated then that that's the intent
22 of the fiscal plan. Subsequently they passed the compliance
23 law, which by its own terms empowers AAFAF to take the
24 dedicated sales tax from COFINA. On the same day, the
25 Governor issued an explanatory statement which said that's

1 not really the intent, but I don't know what any of this
2 means. It seems to me that it's ambiguous what the actual
3 intent and what the actual meaning of these statements are,
4 what the actual meaning of the law is, what the actual
5 meaning of the structure that the Commonwealth government
6 parties have put in place is; and in order to understand
7 what that means, we need to have access to the documents
8 that explain what those parties really intend to do and what
9 those statements really mean because I think they're
10 ambiguous.

11 The second point with respect to relevance is that
12 we do actually have a disagreement, I think, with the
13 government parties on what their obligations are under the
14 resolution. My position is that committing acts that set in
15 motion the process of taking COFINA's dedicated sales tax is
16 itself a breach of the covenants. By way of illustration,
17 COFINA is obligated under Section 705 of the resolution to
18 protect and defend the pledge of the dedicated sales tax.
19 If other parties within the government are setting up the
20 structure which allows that dedicated sales tax to be
21 confiscated and taken back from COFINA and if COFINA does
22 nothing, that's a violation of that covenant, whether or not
23 it's public or not.

24 THE COURT: But if I said to the government
25 entities, "If you don't produce a document in this, you

1 can't use it, period," what argument would you make on your
2 summary judgments? Like, what do you need the documents
3 for? Because it seems to me you have some fundamental legal
4 issues that need to be resolved. You need to know the scope
5 of their duties. You need to know, is it an affirmative
6 obligation to stop something or not? Is leaving it
7 ambiguous a violation of their obligations? But what
8 somebody thought about what the fiscal plan is going to do,
9 I don't know what that adds to your summary judgment.

10 MR. KUEHN: Because the messages so far are mixed.
11 We've heard that we're not going to take the dedicated sales
12 tax and the structure is not designed to take the dedicated
13 sales tax. We've heard that it is designed to cool the
14 resources and take the dedicated sales tax. And so we need
15 to be able to resolve that factual ambiguity. Regardless of
16 what the duties actually are -- and again I agree that
17 that's eventually going to be a legal question as to how you
18 interpret the duties under the resolution -- but the factual
19 matter of whether they've complied with those duties is not
20 clear from the face of the documents that are publicly
21 available.

22 THE COURT: So let's say you end up with
23 communications that are split, that you have some people
24 saying, "This is what I intended when I put a fiscal plan
25 forward," and then somebody else says, "But that's not what

1 I intended when I put it forward," does that preclude you
2 from moving for summary judgment?

3 MR. KUEHN: No, I don't believe it would, but we
4 would argue that depending on what the facts show, depending
5 on who intends what, that we will be able to show that the
6 party that intended to take the dedicated sales tax speaks
7 on behalf of AAFAF and thus has violated the terms of the
8 resolution, has breached that covenant.

9 THE COURT: The other problem that I have here is,
10 I have both extremes. I have you asking for everything, and
11 I have the government refusing to produce anything, which
12 makes it easy, or hard; I don't know which. What are you
13 really looking for?

14 MR. KUEHN: If this process had begun earlier, if
15 the government parties had reached out to us when we
16 initially served the document demands, and we had at that
17 point been able to create a protocol that narrowed and
18 created a way for them to review the documents in time to
19 produce them by the end of discovery, you know, I think that
20 we would be in a very different place. The problem is that
21 there's been a pattern of delay, and I think what's really
22 happening is, they're trying to run out the clock. You
23 know, they're hoping that if we wait long enough, they'll
24 get the result that they actually asked for on June 1 and
25 June 2, which is to produce nothing. I think that the

1 obviously reasonable way to solve the issue right now is to
2 simply ask them to produce the documents that hit our search
3 terms that relate to, again, the issues of, you know, what
4 the parties have done, what the government parties have done
5 behind the scenes in the time leading up to today; and if
6 they want to address the deliberative process privilege on a
7 document-by-document basis after the documents have been
8 produced, we're willing to agree that the production of the
9 documents doesn't waive the deliberative process privilege.
10 That's fine. But I think that the only real solution at
11 this point in time is to order the production of the
12 documents that hit the search terms that we proposed to them
13 ourselves. You know, they didn't propose search terms to
14 us. They didn't come us to and say, "Here's what we think
15 are the relevant custodians." They never came to us with
16 custodians.

17 THE COURT: How many custodians have you proposed?
18 Have you proposed custodians?

19 MR. KUEHN: No, we haven't proposed custodians
20 because we don't know who are the relevant parties.
21 Obviously we've served subpoenas and asked for the specific
22 individuals we know are relevant, Mr. Elias Sanchez,
23 Governor Rossello, and Mr. Portello; but, interestingly, on
24 Monday the government parties acknowledged that they've
25 identified forty individuals, forty potential custodians who

1 have relevant documents. At least that's my reading of
2 Paragraph 6 of their corrected motion filed Monday evening.

3 THE COURT: And is there any reason that this,
4 from your point of view, needs to go before March 13, 2017?

5 MR. KUEHN: From the perspective of the COFINA
6 Senior Bondholder Coalition, and for this point I'm not
7 speaking for Ambac or Whitebox or National, I think that it
8 should go earlier than March 13, but it doesn't need to go
9 significantly. We're not talking about 2015. The reason I
10 say that is that the fiscal plan obviously wasn't developed
11 on March 13 itself. It took a period of months to develop
12 that fiscal plan, and the development of the fiscal plan and
13 the communications related to that development are relevant.

14 THE COURT: But then you're going to really hit
15 the deliberative process, right?

16 MR. KUEHN: So I agree that we would hit the
17 deliberative process privilege, but I would also point out
18 that the deliberative process privilege is qualified. And I
19 would note that in the government parties' briefs submitted
20 last Friday, all the cases cited except for *Texaco*, the one
21 case that we actually rely on substantially, are FOIA cases.
22 And the reason that's significant is that in FOIA, the
23 deliberative process privilege is not qualified. It's
24 absolute. But in the litigation such as this, it is
25 qualified. And the way that we believe these documents are

1 relevant relate to in some sense the deliberations of the
2 government itself. It's what they are doing. It's what
3 they're trying to do to take our sales tax. And so I think
4 in this case, where the public interest is so great, and
5 where our interest is so great at getting at the truth, and
6 where the documents go directly to the process itself, I
7 think that the privilege must yield to these important
8 considerations. You know, we've seen that before. You
9 know, we cited actually one of your Honor's cases, *Williams*
10 *v. City of Boston*, and, you know --

11 THE COURT: You will learn -- this is my word --
12 it made sense at the time. It was fact-specific. That's my
13 theme, and I stick with it whenever anybody cites a case to
14 me.

15 MR. KUEHN: I think in this case it is very fact-
16 specific. You know, we are interested in what the fiscal
17 plan really means and what the parties have done to set up a
18 structure which has the ultimate effect of taking the
19 dedicated sales tax, which is itself a breach of the
20 resolution.

21 THE COURT: Though there have been discussions
22 afterwards.

23 MR. KUEHN: Absolutely.

24 THE COURT: There have been explanations or
25 purported partial explanations afterwards.

1 MR. KUEHN: No question. Communications that
2 occurred after the decision, under First Circuit precedent,
3 are clearly outside of the privilege.

4 THE COURT: Okay.

5 MR. KUEHN: What it comes down to, your Honor, the
6 government had a decision in formulating the fiscal plan.
7 They could have kept COFINA's dedicated sales tax separate
8 or they could have pooled it. They chose to pool it. We
9 believe that's a violation of the covenants, and we need to
10 understand why.

11 THE COURT: Let me actually hear from the
12 government on those issues, and then we'll switch.

13 MR. CANTOR: Good morning, your Honor. Dan Cantor
14 on behalf of what we've called the non-debtor government
15 parties. There were a number of things that I just heard
16 from counsel that were surprising to me. I was surprised to
17 hear that they're not seeking documents concerning the
18 drafting of the plan or legislation. In fact there are a
19 number of specific requests that seek just that. I was
20 surprised that in response to your question about how we get
21 between all or nothing, their answer was that the only real
22 solution is all. But perhaps what I was most surprised
23 about was to hear them say that somehow the issue of whether
24 there was a breach here is something that is going to be
25 based on documents that they now consider to be ambiguous;

1 that the reason that they need to get into the deliberations
2 of the government is that somehow what happened here, the
3 facts of what happened here are ambiguous. This is 180
4 degrees opposite of the position that they took when they
5 responded to the trustee's original motion in the
6 interpleader action where they said that the covenants were
7 clear and unambiguous and that the Court could determine
8 whether there had been a breach of those covenants as a
9 matter of law. And that's what we agree, your Honor, is the
10 case here. Counsel's last comment was about needing to get
11 into why things were done. No, you don't need to get into
12 why things were done. The issues here are very simple and
13 straightforward: As they said, was there a breach? Was it
14 curable? Was it cured?

15 And there is no dispute here among the various
16 parties as to what happened. The various parties have come
17 up with seven different instances of breach. Not all of
18 them agree on what breaches there were, but in total there
19 are seven different instances. But everyone agrees as to
20 what happened here, right? Everyone agrees as to what plans
21 were proposed, what laws were passed, what litigations were
22 filed, and what public actions COFINA did or did not take
23 here. This is all a matter of public record, and the only
24 question that the Court is going to have to answer on
25 summary judgment is whether any of these events are an event

1 of default, whether there's been a breach of the bond
2 resolution, and this is a pure question of law that does not
3 require discovery.

4 Let me also say, your Honor, that your Honor made
5 a comment about the fact that it's all or nothing. We're
6 not saying nothing. We actually have in fact agreed to
7 produce a variety of types of documents. We have agreed to
8 produce documents, hard-copy documents. Non-email documents
9 that exist on the computers of relevant custodians, we've
10 produced some of that. We would have produced more if the
11 confidentiality order was in place, and when it is, we will
12 be in a position to produce --

13 THE COURT: What kinds of documents are you
14 producing?

15 MR. CANTOR: We're going to be producing bank
16 statements, financial statements. We would produce
17 non-email correspondence with third parties. I would also
18 note that the parties have available to them everything
19 that's in the data room that was created in connection with
20 the fiscal plan, which is a huge amount of information
21 about, you know, how the fiscal plan was created and how the
22 fiscal plan works. So they've got an enormous amount of
23 information available to them, and, as I said, we are
24 willing to search for certain documents and produce certain
25 documents. We draw the line at the email because the email

1 is just so over the top in terms of how broad it is, how
2 burdensome it will be.

3 But the bottom line is, the issues in this case
4 that need to be decided on whether there's been a breach, a
5 cure, et cetera, they're issues that can be phrased in terms
6 of questions beginning with "what." What happened here?
7 What does it mean for the bond resolution? And the
8 discovery they're seeking, as you heard counsel say, is
9 almost exclusively addressed to questions of "why," and
10 "why" is not an issue here: Why did the government do this?
11 Why did the government decide to do one thing versus
12 another? That's not the question here. The covenants at
13 issue are black and white: Either something happened or
14 something didn't happen. There's no state-of-mind issue
15 here. It doesn't matter whether a covenant was breached
16 negligently, recklessly, maliciously, whatever. None of
17 that matters. The only question is, under the clear and
18 unambiguous terms, as they've told you, under the clear and
19 unambiguous terms of the resolution, and based on the clear
20 and unambiguous terms of the acts that were passed or the
21 plan, has there been a breach of one of these covenants?

22 THE COURT: Let me ask you this: Am I
23 oversimplifying things if I say to you, is really the issue
24 here what all of these things, the fiscal plan, the
25 resolutions, the compliance law, what happens to the

1 dedicated sales tax? I mean, that's the issue, right?

2 MR. CANTOR: I think that's right.

3 THE COURT: And that's a "what" question, though,
4 and what he's saying to me, I think --

5 MR. CANTOR: Right.

6 THE COURT: -- is that there's mixed messages
7 coming out of the government as to what happens to this
8 sales tax under these plans. And if we were able to limit
9 discovery to that issue -- in addition, you know, you've
10 produced that you have that room, and it's got some drafts
11 and it's got some financial data, and I think that a lot of
12 that is beyond the scope of really this proceeding -- but if
13 we were able somehow to limit discovery to what does the
14 government say happens to this dedicated sales tax
15 throughout these proceedings, doesn't that move it forward?

16 MR. CANTOR: Well, but you don't need to get into
17 the emails of the government and into the deliberative
18 discussions of the government in order to answer that
19 question. The government acts through public acts and
20 pronouncements. If their claim is that notwithstanding what
21 has been said, the government might do something different
22 in the future, then essentially they're admitting that
23 there's been no breach yet, just that there might be a
24 breach in the future. But in terms of what has actually
25 happened here -- and, as I said, there is no dispute as to

1 what has actually happened in the public realm here --
2 that's what is at issue in this lawsuit, in the interpleader
3 action, is, what has actually happened? Is it a default?
4 Can it be cured? Has it been cured? You don't need to get
5 into all of the deliberations that went on behind scene as
6 to what they may or may not do or what they may or may not
7 have meant. It's been said over and over that these
8 provisions are clear on their face. If they're a breach,
9 they're a breach. If they're not, they're not, but that's a
10 legal question to be decided.

11 THE COURT: But it sounds like -- what I don't
12 want to do is say to you, "If you haven't produced it, you
13 can't use it," and then you end up in a summary judgment
14 fight, and you want to use these documents that explain the
15 actions that were taken. I mean, unless you're going to sit
16 here and tell me you're not going to put in any witnesses or
17 any documents --

18 MR. CANTOR: Right. Your Honor, unless I'm
19 mistaken, I don't believe that it's us that will be
20 defending the action.

21 MR. FRIEDMANN: Your Honor, it's Peter Friedmann
22 from O'Melveny & Myers. Is it okay if I --

23 THE COURT: Speak into the mic.

24 MR. FRIEDMANN: It's Peter Friedmann from
25 O'Melveny & Myers. So just to provide a little

1 background --

2 THE COURT: And who are you?

3 MR. FRIEDMANN: I also represent AAFAF and the
4 non-government actors. We did not file an answer. The
5 answer was filed by COFINA represented by the Oversight
6 Board. So we aren't going to be putting forward any
7 documents, and I think Mr. Mungovan on behalf of the
8 Oversight Board would be well positioned to respond to the
9 question of whether or not there would be anything -- that
10 COFINA would in any way be hampered by not producing
11 documents. I'm sorry for interrupting my colleague.

12 MR. CANTOR: It's not our place to make that
13 argument at the hearing, so I can't -- I can't speak to that
14 issue.

15 THE COURT: Okay, fair enough.

16 MR. CANTOR: What I can speak to is that as
17 currently crafted, the burden on the non-debtor governmental
18 parties to respond to what sounds like is, you know, ninety
19 odd requests that are not going to get narrowed in any way
20 certainly by the propounding parties, perhaps by your Honor,
21 but the burden, you know, associated with that is immense.
22 And that's if you just limit it to the nongovernmental
23 parties. They've also asked for production from advisors
24 and attorneys, which we haven't even done the math on what
25 that adds to this in terms of cost and time, but you've got

1 multiple different law firms and multiple advisors involved.
2 What they are asking for is just way, way over the top. And
3 I sympathize with your Honor's attempt to try and get it
4 down to a nugget, and we're not opposed to coming up with
5 some sort of rational approach to discovery here, but, you
6 know, we're talking about, you know, two government agencies
7 and three individuals, you know, who are spending, you know,
8 every waking moment dealing with an unprecedented financial
9 crisis, and they're now being told to turn over every
10 document essentially that they've created since 2015. I
11 think part of the problem we have here is, as I said, there
12 are multiple requests here. It sounds like counsel was not
13 wedded to going back to 2015. I'm not so sure that his
14 colleagues would necessarily agree with that. Those who
15 strenuously believe that there were defaults as early as
16 September of 2015, I'm not sure that they're ready to give
17 up on that. I guess we'll need to hear from them.

18 THE COURT: Well, we'll hear from them, but what
19 I'm doing, where my thoughts are for now is that whether
20 there were or were not earlier defaults is just not critical
21 for this Stage 2 proceeding, so I don't see -- I'm certainly
22 not asking anybody to waive any of their claims now or
23 ruling that they're not applicable. It's just that
24 everybody seems to agree, who is putting forward that there
25 was a default, believes that it occurred in 2017, at a

1 minimum, so I think that's where our efforts need to be
2 focused right now.

3 I would like to figure out a way to limit
4 discovery to the critical question of what is to happen to
5 this dedicated sales tax under these proposed fiscal plan
6 and compliance.

7 MR. CANTOR: I think to do that, your Honor, and
8 I'm certainly not going to be able to quote you back the
9 discovery request that we should have going forward, and
10 especially if we're going to get this done in a way that is
11 not burdensome, both in terms of effort and expense,
12 recognizing, in my view, the limited relevance of what we're
13 talking about here. But, also, if we're going to get it
14 done within the time frame that the Court has set -- and I'm
15 fairly confident that Judge Swain was not expecting them to
16 serve ninety odd requests on non-debtor parties and their
17 advisors and their attorneys and expect that all to be
18 complied with by July 21. I don't think that was at all
19 what she had in mind. So what we need to do is, they need
20 to be realistic in terms of identifying a very limited
21 number of custodians and a very focused set of search terms.
22 And, you know, if they can do that, we are absolutely
23 willing to have a discussion with them about, you know, how
24 we get from Point A to Point B. But where we are now
25 doesn't help anyone who's interested in actually moving this

1 case forward rather than just merely beating up the
2 government.

3 THE COURT: So let me make it clear, to the extent
4 it needs to be made clear, and I hope it doesn't, that it is
5 not the Court's goal to run up bills and to have unnecessary
6 discovery or other legal fees, which will be huge in this
7 case, we recognize; but the Court, and I won't be
8 presumptuous to speak for Judge Swain, but I will speak for
9 me, and I believe she agrees, that we are trying to keep
10 this as streamlined and efficient as possible, recognizing
11 that it is expensive and it is money that's hard fought for,
12 so there's lots of uses for this money other than supporting
13 the legal community.

14 That having been said, I want to make sure that we
15 at least move this along efficiently. There is some factual
16 issues that will need to be fleshed out. I am not making a
17 ruling right now on whether there's going to be a limitation
18 to just the public speaking, the public laws on whether or
19 not that's sufficient to establish a default or not. I
20 don't know. I mean, it seems to me you have a problem, if
21 you have a lot of different people speaking, of proving that
22 there's a default, and I'm assuming that the people who are
23 pushing that there was a default will take that into
24 consideration when they formulate their summary judgments.
25 I mean, I don't know. I don't know how it will be limited.

1 I'm assuming it's going to be focused, but hope springs
2 eternal.

3 What I'm inclined to do right now and what I'd
4 like to do is get into the other areas of the electronic
5 discovery and the like, but right now what I'm thinking is
6 limiting the time frame, and I will hear from Ambac and
7 Whitebox on that, but I'm inclined to limit the time frame
8 to the March, 2017, forward, limiting the scope to what
9 happened, what is intended to happen to this dedicated sales
10 tax. I think there needs to be an agreement on a limited
11 number of custodians, and then we do need to talk about
12 electronic discovery because I can't believe that -- you
13 can't just eliminate that search. In today's world, it's
14 just not possible to pretend that the communications didn't
15 take place on electronic discovery; but I think we need to
16 really focus on custodians, the time frame, and the scope of
17 the search.

18 MR. CANTOR: Yes, and, your Honor, our arguments
19 are dealing with what was in front of us, which was a
20 massive request. We're not going to say that never ever
21 should there be electronic discovery in this case, clearly
22 not, but there are issues of burden and of who we're making
23 bear this burden, a government that obviously is not in
24 great financial shape, to say the least.

25 THE COURT: That much I've picked up on.

1 MR. CANTOR: Yes, I figured as much.

2 Your Honor, I haven't specifically addressed the
3 deliberative process privilege. I don't know if that's
4 something you want to hear at this point. If so, my
5 colleague, Mr. Friedmann, is prepared to address that. I'm
6 not sure if we --

7 THE COURT: I think we need to address it, but we
8 need to address it in the context of what is being withheld.
9 I mean, I have here -- everybody actually can cite to me all
10 the parameters of deliberative process. If you all agree on
11 it, it's really nice. I've read articles. I've written
12 decisions. But it's not practical. So maybe what we need
13 to figure out is sort of within the scope of the discovery
14 that's going to be allowed, you need to then recognize that
15 if the deliberative process is being claimed at that point,
16 it needs to be disclosed.

17 MR. CANTOR: And before I turn it over to my
18 colleague, I guess the other thing I will say is that there
19 is then a functional issue of whether we have to log that
20 stuff because the privilege I believe is extensive in this
21 context, not to mention attorney-client issues that arise,
22 and the logging alone, as we indicated in our papers,
23 involves substantial effort and cost.

24 THE COURT: So I don't think it makes sense to log
25 specific documents. I think it does make sense and needs to

1 have at least the categories of documents that are not being
2 produced. For example, I don't have anything here that
3 identifies even the parties, you know, "I'm not producing
4 such-and-such's documents because he is legal counsel or she
5 is legal counsel, and everything that's been done with her
6 is privileged." I mean, I don't have anything to work off
7 of right now, and I don't think that that's viable. So you
8 need to at least have descriptions of what the issues are so
9 that we can then deal with whether that group makes sense.

10 MR. CANTOR: And I think the reason for that, your
11 Honor, is, for better or for worse, this process did very
12 quickly go down an all-or-nothing route, so there weren't
13 discussions about, okay, well, do Ms. Jones's documents need
14 to be searched? We just never got there with them.

15 THE COURT: So that's why we schlep all of you
16 here to court so that we actually join the real issue. I
17 mean, sometimes that needs to happen, but it does -- I don't
18 know how to say this any clearer. You've all agreed on what
19 the deliberative process is. I mean, everybody is quoting
20 me the same cases, give or take FOIA. You know what the law
21 is, so we need to apply it to the reality here. I'm not
22 making novel rulings of law here. So I'll hear from
23 counsel, but let's figure out sort of what's the best way to
24 tackle that in the actual discovery process.

25 MR. FRIEDMANN: Actually, your Honor, given how

1 you've laid it out, I just don't think it adds much for me
2 to speak at this point.

3 THE COURT: Wow. Thank you. All right, so why
4 don't -- let me hear -- does it make sense for me to hear
5 about the dates first, and then we'll move on from that?
6 All right, so who wants to talk about that? And you hear
7 the theme.

8 MR. LEBLANC: I do, your Honor. Andrew Leblanc
9 from Milbank Tweed Hadley & McCoy on behalf of Ambac, your
10 Honor. And, your Honor, I certainly hear the theme, and I'm
11 not going to belabor the point. I just want to make a few
12 points with respect to the timing. We and Whitebox, and I
13 won't speak for them, but we have alleged breaches that
14 occurred prior to 2017, going back as far as 2015; and, your
15 Honor, it's relevant, in our view, to the current
16 proceeding, this Phase 2 proceeding. It's certainly
17 relevant to Phase 3 when we get there, but it's relevant, in
18 our view, to Phase 2 as well because in addition to the
19 existence of a default, there's also a question of cure,
20 whether or not the defaults are curable. And I think
21 ultimately there will be a question as to whether or not the
22 default had ripened prior to the petition date; and, in our
23 view, to the extent that there were defaults going back as
24 far as 2015 that were uncured, we think that evidence is the
25 lack of ability to cure at this point in time. And that's

1 one of the issues that we understand the Court had teed up
2 for this Phase 2 proceeding, the summary judgment
3 proceeding. And, your Honor, the relevance of that -- and I
4 think it's important to step back, and it was interesting to
5 hear the comments from AAFAF saying that the question is,
6 maybe it's not even a breach; yet today, because they don't
7 know what's going to happen with the sales tax in the
8 future, that's not at all the issue. And your Honor had
9 noted, the issue here as we loosely define it is, there's a
10 series of covenants that obligate COFINA to defend and
11 protect its structure. So the question is, what did they do
12 to defend and protect the structure in 2015, in 2016, in
13 2017? They clearly, in our view, there's no question, in
14 our view -- and we agree with you, your Honor, that whether
15 or not there exists a default today is an easier question.
16 The facts are more clear. We think there is, however, that
17 we can show, and it may not be a summary judgment argument,
18 but we could show that they failed to defend the structure
19 going back as far as 2015, and that the failure -- and I
20 will say, your Honor, that this is not necessary for us to
21 prove to establish that it is incurable today, but it would
22 certainly be sufficient for us to show that there was a
23 default starting as early as 2015 that was left uncured for
24 a two-year period of time. That's the gravamen of why we
25 think it's relevant to go back to 2015. And to be clear,

1 your Honor, what we've asked for, we served five requests
2 going back to 2015. We are satisfied with all of the other
3 requests that are part of our joint set of requests
4 beginning at a later period of time, but we served five
5 requests that go back to 2015 relating specifically to the
6 acts that we allege in our complaint and that we challenge
7 are default as of 2015.

8 And, your Honor, you're absolutely right that the
9 critical dates, the more significant dates, and the easier
10 question, in our view, is whether or not a default exists
11 today, but we think that that prior period is also relevant
12 to whether or not it's curable and whether or not a default
13 existed prior to the petition date. That's the gravamen of
14 why we have sought and why we think it's important to have
15 this narrowly tailored limited discovery that we served
16 going back as far as 2015.

17 THE COURT: Okay.

18 MR. LEBLANC: Your Honor, I could comment on other
19 issues about it, but I think it's all been covered at this
20 point, and I'll just leave it at that on the timing, unless
21 your Honor has any questions for us.

22 THE COURT: No. I think I'm good.

23 MR. LEBLANC: Thank you, your Honor.

24 MR. ROMANELLO: Your Honor, Salvatore Romanello
25 from Weil Gotshal & Manges on behalf of National Public

1 Guarantee Corporation. We insure \$1.1 billion in created
2 value of COFINA bonds. We joined in the joint requests.
3 You've heard from Mr. Kuehn. We have little to add other
4 than, with respect to the date range, we would request the
5 date be slightly before that March time frame, perhaps
6 February 15. And the question, again, Mr. Leblanc referred
7 to the duty to defend and preserve what were the parties,
8 what was AAFAF, who in open court has said that they're the
9 representative of COFINA, what was AAFAF doing to defend and
10 preserve? And what were the other entities that had an
11 obligation, what did COFINA do to defend and preserve? We
12 think that's very important to prove a breach. It's not
13 that we couldn't prove it without it. Perhaps we could on
14 the law. But if we get those facts to show that nothing was
15 done, well, that supports our case, and that's why we think
16 you have to go back to a period slightly before when the
17 fiscal plan was announced, so we would suggest February of
18 2017. Thank you, your Honor.

19 THE COURT: Thank you.

20 MR. DAVID: Good morning, your Honor. Kenneth
21 David from Kasowitz Benson Torres on behalf of Whitebox, and
22 I'll be very brief. I certainly heard your Honor's view on
23 the time frame. One point we wanted to hit in particular
24 was, we think that the 2015, 2016 events of default are
25 relevant to Phase 2, and in particular the asset allocation

1 of the disputed funds, because if there was an event of
2 default, then, in our view, and as we've alleged in our
3 answer and cross-claims, that affects who can be paid. Even
4 on the June and July payments that are in dispute right now
5 in the Phase 2, we think that that would affect whether or
6 not payments would be accelerated on the filing of the
7 Title III and whether or not the sub-bonds could be paid
8 after an event of default. So we think it in fact does get
9 to the issues that are ripe for Phase 2.

10 THE COURT: But is there any difference in the
11 order of payments, assuming the default in 2015 or assuming
12 the default in 2017? Like, it's going to be the same
13 acceleration, right?

14 MR. DAVID: Not necessarily. It depends on the
15 timing, your Honor, and what payments we're talking about.
16 So if there was --

17 THE COURT: Well, because in Phase -- like, right
18 now we're talking about the payments that are from June 1
19 forward, right?

20 MR. DAVID: Correct.

21 THE COURT: Right? So we're not going back to
22 what -- whether the payments were appropriate before then it
23 seems to me is Phase 3, Stage 3.

24 MR. DAVID: I mean, it is certainly part of
25 Phase 3, your Honor. It could be part of Phase 2 if it was

1 extended, but I certainly agree that Phase 2 is focused on
2 the June and July and going forward.

3 THE COURT: So if you are able to establish a
4 default in 2017, do you get a different result for the
5 June 1 forward payments than you would if you also
6 established a default in 2015?

7 MR. DAVID: It depends on the timing, your Honor,
8 I think, with respect to when that 2017 default will have
9 happened because there is a cure period, even though we
10 argue that it was incurable, but there are folks who say
11 there was a cure period up until -- I think today is the
12 date that it can be cured, and so if it's an event of
13 default as of today --

14 THE COURT: Is anything happening today that I
15 should know about?

16 MR. DAVID: No. I don't think it's going to be
17 cured, and in fact, as we're alleging and argue that it's
18 not curable. But the question is whether that would cover
19 June payments or even the July payments because it's now
20 after those dates, so whether the event of default happens
21 today or tomorrow could impact what should have happened on
22 June 1 and July 1. But even more importantly, your Honor,
23 what if the 2017 event of default is not found to have been
24 an event of default? We obviously think it is and like
25 others feel strongly about that, but then our view is, if

1 for some reason that is not an event of default, we have
2 these other four or five that we rely on and feel quite
3 strongly about, and so we think that we're entitled to
4 discovery about that. I certainly hear your Honor about the
5 burden and time frame. We, like Bank of New York referenced
6 earlier, we reached that resolution going back that far, and
7 we'll produce it if that's what everyone else is doing, and
8 certainly Bank of New York is. So we appreciate the burden,
9 but unfortunately we think it's a necessary burden to get at
10 the facts, because here the government entities and the
11 nongovernment entities are not admitting that there was a
12 default or even a breach of the covenants. They've either
13 denied information or denied sufficient information to form
14 a belief, or they've denied it outright. And so we have to
15 prove that, and we need to be able to get to the facts, if
16 they're going to have explanations similar to the compliance
17 law and the fiscal plan of 2017. If they have a similar
18 answer for what happened in 2015 and then 2016, we should be
19 entitled to the same view, the same facts and evidence that
20 your Honor mentioned about what it is was intended and what
21 it is that the government intended to do with the tax funds
22 based on these fiscal plans and proposals.

23 THE COURT: All right, so what I'm inclined to do,
24 and which always gives you an opportunity to tell me I'm way
25 out of line, but what I'm inclined to do is to say that this

1 Stage 2 is limited to potential defaults from January 1,
2 2017, forward, or I guess March, the March date, the March
3 date forward. It's without waiver of a claim that there was
4 earlier defaults. You may want to exchange that discovery
5 now if you think it's going to be relevant to Stage 3 and
6 it's easier to do it, you know, now than divide it. But my
7 understanding, which I admit is probably limited, but it
8 seems to me that the 2017 events are cleaner than the 2015
9 events, so that if you are unable to establish a default in
10 2017, you have a weaker case for the events that took place
11 in 2015. I don't know enough -- I'm not prejudging it at
12 all, nor do I get to judge it at all, so it's easy for me to
13 say, but the events in 2017 are very concrete and specific,
14 and I think that we do better to move forward on those,
15 especially since we're dealing with the funds now and this
16 is just the one adversary proceeding. So I think that's how
17 I'm going to address the earlier claim, the earlier time
18 frame.

19 I hear you. I'm not hearing that the order would
20 be remarkably different. If there's an event of default in
21 2017 and it's not cured, it seems to me the consequences as
22 far as what happens to these payments is the same. You
23 know, you have the same priorities as if there had been a
24 default in 2015.

25 MR. DAVID: Well, respectfully, your Honor, I

1 don't think that's necessarily the case. Again, I would go
2 back to my point about the timing because the timing is
3 important here for the June and July payments that haven't
4 been made and are at the center of the dispute. And in
5 fact, your Honor, if we eliminate the pre-2017 allegations
6 of event of default, that's in essence granting summary
7 judgment against us at this stage because we're then not
8 allowed to argue those and certainly aren't being given
9 discovery about those, and in fact it seems like a
10 preclusion of some sort against us. I understand that the
11 burden is there, but I think it's a necessary one that we
12 have to go through.

13 At the very least, we think that there should be
14 limited discovery, and we've been open to negotiating the
15 type of discovery that we get and certainly can try to
16 narrow the burden as much as possible. We appreciate that
17 it's two years, and emails from two years, even from a few
18 individuals, can be quite burdensome. So respectfully, your
19 Honor, that's what I have to say about that but certainly
20 hear your point.

21 THE COURT: What you can do is propose a different
22 stage to deal with these if you think that it needs to be
23 addressed after this schedule. If you think that these
24 summary judgments -- I'm limiting these summary judgments to
25 these events. If you want to propose another phase that

1 would deal with the earlier ones, you can do that, but I
2 think that I'm not hearing an argument that is persuading me
3 that we need to move all the discovery earlier to address
4 the critical issues in the short time frame that are marked
5 up for this round of summary judgments.

6 MR. DAVID: Well, and, your Honor, I appreciate
7 that, and the one thing I would say to that: That new phase
8 that you're suggesting as a possibility certainly could be
9 something we could discuss, but I'm not sure that all the
10 other parties would agree with that because I think everyone
11 is looking for resolution on the June and July payments and
12 soon to be the August payments when we have those summary
13 judgments in the fall, and as are we, of course. And if the
14 2017 events of default are not successful, then you're going
15 to have parties saying that the pre-event of default
16 waterfall payment priority should be applied, and then you'd
17 have at least Whitebox -- I don't want to speak for Ambac --
18 that would be saying, "Hold on. We still have these
19 pre-2017 events of defaults that we think are applicable and
20 prevent the old waterfall from applying."

21 THE COURT: So I think, and I'll hear from parties
22 if you want, but I think that the 20 -- as teed up now, you
23 will have presented the legal rulings as to the scope of
24 obligations, and you will have addressed some factual
25 issues. Some of those are going to affect your analysis of

1 the strength of your claim of earlier default, so you will
2 have some information at that time that you don't have now.
3 For example, some of the discussions about what were the
4 obligations and what is an event of default is failing to
5 affirmatively take a step, an event of default, you know,
6 those kind of things, and I think those will be defined in
7 the context of this summary judgment. And I think that at
8 that point Ambac and Whitebox need, you know, need to take a
9 look at what their claims are about their earlier defaults
10 and see if it's worth pursuing. And, you know, at that
11 point we're dealing with a finite period, and if it needs to
12 stall things for another month or so, it will; but I think
13 it's more important to get this done than it is to open up
14 the discovery back to 2015 at this point.

15 MR. DAVID: And I appreciate that, your Honor.
16 The last thing I'll say, I promise, is that unfortunately I
17 don't think it would be a month at that point if we had to
18 then reopen discovery on certain issues from whether it's
19 2015 or 2016. I think we'd be right back in front of your
20 Honor dealing with these disputes, which I would love to get
21 done in a month, if we possibly could, but I don't
22 anticipate that happening, and so I think we would be
23 ultimately delaying things even further if we went down that
24 road. Hopefully we don't have to. Hopefully the 2017
25 events will resolve this and we can move forward. We're

1 just concerned, and we don't want to prejudice our rights
2 and our allegations and positions by not pushing for what we
3 think is appropriate discovery going back to 2015. But with
4 that, I certainly hear your Honor. Thank you.

5 THE COURT: Is there anybody here who wants to
6 convince me that going back to 2015 isn't going to take any
7 effort? That having been said, I'm going to stand by my
8 dates, but I need to figure out when the beginning of the
9 2017 date is, and I need to figure out how we make this
10 happen. So do I tell you to spend your lunch hour doing
11 that?

12 MR. CANTOR: Your Honor, I think we're heading in
13 the same direction, but I think, in order to make this
14 process work well, what we need to come out of here today
15 with is a very specific identification of the issue on which
16 discovery is going to be permitted. If we're focusing on
17 the alleged March default, what is it that's not in the
18 public realm that is the issue that they need discovery on
19 to be explored? Because otherwise I can foresee us being
20 back here, you know, in a week saying, you know, "We thought
21 this was going to be a very narrow issue, and yet here are
22 all of these document requests again." So I really think we
23 need some, you know, clear definition of what it is that
24 we're going to be having discovery on, in addition to
25 obviously figuring out who the right people are and the

1 right terms.

2 MR. KUEHN: Your Honor, we need clarity as to what
3 these government statements and acts mean. It's that
4 simple. It's that simple. We need --

5 THE COURT: So it's the statements regarding what
6 is intended to be done with the dedicated sales tax?

7 MR. KUEHN: Correct. Correct, your Honor.

8 THE COURT: So you guys talk about that over
9 lunch, all right? But that's going to be my order.

10 Oh, there's somebody I haven't heard from.

11 MR. MUNGOVAN: Good morning, your Honor. Timothy
12 Mungovan from Proskauer Rose for the Financial Oversight and
13 Management Board for Puerto Rico, both on behalf of the
14 Oversight Board and the Oversight Board as representative of
15 the Commonwealth and COFINA.

16 I think that's an important distinction, your
17 Honor. You've heard a little bit about that from AAFAF's
18 counsel already. And just to clarify, on the date that the
19 Title III cases were commenced with respect to both the
20 Commonwealth and COFINA, the Oversight Board became the
21 representative of those two entities on that date under
22 PROMESA. I think it's important to recognize the
23 distinction of that date because prior to that date, of
24 course, the Oversight Board was engaged in its duties in the
25 context or under the auspices of PROMESA. Prior to the

1 dates that the Title III cases were commenced, of course,
2 the government was in charge of and managing the affairs of
3 the Commonwealth, and the Government Development Bank was
4 managing or AAFAF was managing the affairs of COFINA. And
5 so with respect to discovery issues related to the Oversight
6 Board versus the Commonwealth versus COFINA, prior to the
7 date that the Title III cases were commenced, that
8 information truly does reside within the control
9 functionally, the day-to-day aspects of AAFAF. And the
10 Oversight Board, while we are the representative of those
11 two entities, does not have control over -- day-to-day we
12 don't have possession of the actual documents.

13 What's important I think to recognize is that when
14 we're talking about discovery going forward, your Honor,
15 specifically with respect to the discovery requests,
16 including a subpoena that was served on the Oversight Board,
17 many of the requests seek information from the Oversight
18 Board prior to the date that the Title III cases were
19 commenced, and we think that that information is, as we've
20 set forth in our papers, irrelevant. And so what I would
21 ask is, as we're framing a process for a resolution of these
22 discovery issues, that we distinguish and clarify between
23 the documents that are at COFINA, if you will, and the
24 documents that are at the Commonwealth versus the
25 deliberations and the certification deliberations of the

1 Oversight Board, which PROMESA indicates are not subject to
2 the jurisdiction of this Court, at least challenges with
3 respect to those certification determinations. And so
4 discovery related to those certification determinations we
5 would suggest to the Court are off-limits. We can have a
6 discussion certainly about what we would consider to be
7 public communications from the Board, or communications
8 outside of the Board to Banco Popular, or to Bank of New
9 York Mellon with respect to these issues, but the internal
10 communications and discussions at the Board we would suggest
11 are not relevant to the purposes of this interpleader
12 proceeding and whether or not an event of default has
13 occurred. Thank you, your Honor.

14 THE COURT: Thank you. So I guess I need to hear
15 from the Coalition just on that point first.

16 MR. KUEHN: Your Honor, I think that we can
17 certainly work with the Oversight Board. We understand the
18 Oversight Board's position with respect to the documents
19 they have and who represents COFINA at different time
20 frames. I think it's important, however, that if that is
21 the case, that we obtain the necessary documents from AAFAF
22 and the government parties.

23 THE COURT: All right, so this is what I'm
24 thinking that I would like to think about more and I'll do
25 during lunch, but I think we need to come up with a limited

1 definition of the types of documents that we want, and I
2 think that has to do with defining the scope being, what do
3 these events mean with respect to the use of the dedicated
4 sales tax? I think we need to figure out how to come to
5 terms with a limited number of custodians. Somehow you've
6 got to work that out. Otherwise I could pick a random
7 number; nobody will be happy with it. And the search term
8 protocol, like, at least a schedule for that. And I am
9 inclined to do the time frame of February 15, 2017, forward.
10 I recognize that there's going to be a claim of deliberative
11 process before then probably, but that needs to be logged.
12 You know, it needs to be described so we can do it, and it's
13 not to stop the later discovery. Okay?

14 MR. FRIEDMANN: Your Honor, Peter Friedmann from
15 O'Melveny & Myers. Just to be clear so there are no
16 surprises later, I think it is our view, under the First
17 Circuit's decision I think in the *Planned Parenthood* case,
18 that we believe that execution, comment, et cetera, that
19 occurred, A, post-decision can remain during the
20 deliberative process; and, B, our very strong-held view is
21 that the deliberative process here relates to the entire
22 financial emergency identified by Congress in Section 404.
23 It can't be atomized to certification of the fiscal plan
24 because certification of the fiscal plan leads into the
25 filing of Title III and formulation of a plan of adjustment.

1 So I just want to be clear that that's our view.

2 THE COURT: All right, and I'm hoping that I'm
3 being clearer. I always think I'm clear. Not everybody
4 agrees, but I think that the discovery is factual discovery.
5 Most of the information requested here is factual, so the
6 deliberative process is not going to be a defense to the
7 request for facts, okay?

8 MR. LEBLANC: Your Honor, again, Andrew Leblanc,
9 Milbank Tweed, on behalf of Ambac. Your Honor, just one
10 point of clarification when we do confer. We think one area
11 of exploration through discovery is, what steps, if any,
12 were taken to defend and protect the COFINA structure? And
13 I just don't want to go into a break where we're conferring
14 with the other parties, and they say, no, no, no, you didn't
15 mention that. That to us is sort of the central question
16 here, and so we think we're entitled to documents reflective
17 of steps, if any, that were taken to defend and protect the
18 COFINA structure, both by the Commonwealth, who has their
19 own obligations not to interfere with it, and by COFINA
20 through AAFAF, which was its representative which had the
21 affirmative duty to defend that structure. So that to us,
22 understanding and accepting your Honor's view as to what I
23 think would be a Stage 2-A with respect to the timing of a
24 potential default, that to us is entirely relevant to what
25 we should be doing for 2017 forward.

1 MR. CANTOR: Your Honor, that is a Texas-sized
2 loophole in what we've been discussing this morning, and I
3 think, quite frankly, we can take a step back from it and
4 separate it from the discussions that we've been having this
5 morning because it goes back to the original point about
6 what is the proper scope of discovery here and what
7 questions are relevant to the issues that need to be decided
8 here. The description of this duty to defend is some sort
9 of an open-ended duty to defend that exists at all times and
10 for all purposes and goes to -- what, you know, these folks
11 do on a daily basis in their job is entirely divorced from
12 the language of Section 705 of the bond resolution, which
13 talks about a duty to defend against claims or demands. In
14 our view, a claim or demand is by necessity some sort of
15 public act that has occurred, and thus the duty to defend
16 against that also involves public acts. It does not involve
17 what went on in the day-to-day operations of the government,
18 and certainly doesn't give rise to a right to -- some sort
19 of open-ended inquiry into, what did they do to defend?
20 Either they took a public act in defense against a claim or
21 demand, which in and of itself requires some specificity as
22 to what we're talking about, or they didn't take action to
23 defend. It has nothing to do with what goes on within the
24 walls of the government that the public doesn't see.

25 THE COURT: I promised Puerto Rico that I would

1 break at noon for lunch, so let's break. Let's actually
2 come back -- why don't I give you a little longer than an
3 hour so that you can spend some time talking, an hour and a
4 half, all right? Come back at 1:30. This will be a topic
5 of discussion this afternoon, but let's see if you can make
6 some progress on the other issues.

7 MR. KIRPALANI: Your Honor, if I could just add
8 one statement in 30 seconds. I'm a little concerned by what
9 AAFAF's counsel just said in terms of their understanding of
10 what they think is a relevant fact, and I just want to give
11 you a real-world example. If AAFAF reaches out to COFINA's
12 agent, which is Banco Popular that collects the sales tax
13 every day for the benefit of the bondholders, and says,
14 "We'd like to discuss with you a way to change the payment
15 streams and surrender your agency back to the Commonwealth,"
16 we believe that document would be highly relevant to whether
17 they've defended and protected; and the way that counsel for
18 AAFAF is envisioning this unfolding seems to be that he
19 wouldn't have to produce that email, if it exists.

20 THE COURT: So the problem, I think, comes from
21 this "all or nothing." We're back in that circle. I mean,
22 if there is specific levels of communication that you want
23 them to search for, then we have a specific fight.

24 MR. KIRPALANI: Okay.

25 THE COURT: All right?

1 MR. KIRPALANI: That's doable.

2 THE COURT: So think about that.

3 MR. KIRPALANI: Thank you, your Honor.

4 THE COURT: All right? We're going to break now
5 till 1:30.

6 THE CLERK: Court is in recess.

7 (Noon Recess, 12:06 p.m.)

8 (Resumed, 1:35 p.m.)

9 THE COURT: All right. I gave you a long lunch
10 hour, so I'm sure you solved all the world's problems,
11 right?

12 All right. Where are we?

13 MR. KUEHN: Good afternoon, your Honor. If I may,
14 I'd like to give the court an overview of what we discussed
15 throughout lunch. During the lunch period, the COFINA
16 Senior parties, including our COFINA Senior Bondholder
17 Coalition, along with Ambac, National and Whitebox,
18 discussed a proposal that we think could alleviate some of
19 the government parties' concerns about burden as well as
20 address our concerns. We've presented that proposal to the
21 government parties during lunch. And we don't have an
22 agreement, but I'd like to set out what we proposed.

23 We proposed that, consistent with your Honor's
24 views on the relevant time period, that the government
25 parties would run a set of search terms, specifically those

1 search terms that we had previously presented to the
2 government --

3 THE COURT: Excuse me.

4 MR. KUEHN: -- last week, last Tuesday, against a
5 limited number of custodians. In the filing on Monday, the
6 Commonwealth -- pardon me -- the government parties noted
7 that they had identified and run search terms across two
8 custodians but had identified 40 additional potential
9 custodians. We would ask that the government parties run
10 those search terms across the three individuals whom the
11 four COFINA Senior parties served subpoenas on, specifically
12 Governor Rossello, Elias Sanchez and Geraldo Portello, as
13 well as the head of the GDB, which is one of the individuals
14 who the government parties have already run the search terms
15 across.

16 We also would ask that the government parties
17 produce to us or give to us the list of the 40 custodians or
18 potential custodians they have identified, along with their
19 titles and their reporting line within the government. And
20 we would pick three additional custodians from those 40
21 against whom the government parties would also run the
22 search terms.

23 In addition, in the interests of alleviating the
24 burden of review of the documents, we would agree that the
25 government parties may apply privilege screens to the

1 documents. In other words, they may withhold in whole
2 documents that are simply or entirely between the parties
3 and their attorneys and log those documents categorically,
4 as your Honor suggested before break.

5 We would ask that those categorical logs, however,
6 be detailed. We would like to see when the first
7 communications on a given topic began and when the last
8 communications occurred, as well as a sufficient description
9 to understand exactly what the description -- pardon me --
10 what the conversation was.

11 We would agree that if the government produces any
12 documents that they later determine are subject to a
13 deliberative process privilege that they reserve the right
14 to argue that those documents are privileged at any point in
15 the future and that they do not waive any deliberative
16 process privileges by producing these documents.

17 We think that's a fair and reasonable way to
18 resolve the dispute. It's a limited number of custodians, a
19 limited timeframe. I would note also that to the extent
20 that the search terms that we have proposed produce any
21 unreasonable number of hits for particular search terms, we
22 are willing to discuss that. We just simply haven't had any
23 response to our particular search terms at all until now, so
24 it's difficult for us to say, you know, a search term -- any
25 particular search term needs to be revised. We would be

1 happy to discuss that, but it needs to be done quickly.

2 THE COURT: The response to that?

3 MR. FRIEDMANN: Yes, your Honor. Peter Friedmann
4 from O'Melveny & Myers on behalf of AAFAF.

5 The search terms are bound to be overly broad.
6 They ask for the term "COFINA," from, for example, COFINA
7 and AAFAF. So we think that it's not a constructive start.

8 I think what we would be prepared to do is
9 provide, we think, information, documents that go to the
10 most important issue and can be collected in an appropriate
11 timeframe.

12 THE COURT: Will you talk into the mic? I'm
13 having trouble hearing you.

14 MR. FRIEDMANN: Yes. I apologize.

15 So, for example, with respect to what I understood
16 to be the key issue of the morning, which is, are SUT
17 revenues being used under the fiscal plan, we think they may
18 already be there but are certainly willing to in a more
19 clear fashion provide documents sufficient to answer the
20 question of whether or not the proposed fiscal plan or the
21 certified fiscal plan uses SUT revenue, and not just SUT
22 revenue but essentially how much of the COFINA revenue and
23 when.

24 Just to be clear, at this point no COFINA money is
25 being used and won't be. In fact, as you heard

1 Mr. Bienenstock say the other day in court, any money being
2 used from COFINA will be subject to court order and
3 determined in the future. But nevertheless, we are willing
4 to provide documents sufficient to show -- and I don't think
5 it's necessary for e-mails to do that -- but we are willing
6 to provide documents sufficient to show whether or not SUT
7 revenue and COFINA money is being used and in what years.

8 THE COURT: So is it a better phrasing to say,
9 What happens to this money, as opposed to whether it's being
10 used?

11 MR. FRIEDMANN: Yes. Absolutely, your Honor. I
12 don't think there's any dispute right now that money is
13 being used. I will say we're willing to provide information
14 as to the current fiscal plans and amendments, documents
15 sufficient to show whether they used SUT revenue and when,
16 if ultimately they become part of the public policy of
17 Puerto Rico, slash, approved by a court. Here is what we
18 have proposed to do.

19 THE COURT: Okay. But I don't want to -- I think,
20 first of all, it should be the documents that reflect what
21 use is intended to be made of these monies, just where does
22 it go? Okay. So that's a broader -- I think that's a
23 little broader than what you're saying.

24 MR. FRIEDMANN: Yes.

25 THE COURT: I don't want to get into is it being

1 used, yes or no. I want to get into where does it go.

2 MR. FRIEDMANN: Your Honor, I think the answer to
3 that really is we don't trace dollar for dollar. We say,
4 look at our budgets in the future or look at the fiscal plan
5 in the future, and we have provided people with a fiscal
6 plan backup model that's in our data room. But to the
7 extent we can provide, working with our financial advisor
8 and reviewing the existing documents, something more
9 specific, we will absolutely work to provide that
10 information.

11 THE COURT: But I think that's also information
12 that can be the subject of e-mails. So I understand the
13 debate on whether intent and whose intent is controlling. I
14 think that's for down the road. I think for discovery,
15 though, it's appropriate to get from a finite number of
16 custodians the answer to the question of what their
17 understanding is as to what is to be done with these
18 revenues. Okay?

19 A search term like "COFINA" though is obviously
20 going to be too broad. So you might -- my all-time favorite
21 was a case where they came in and they said, "We want one
22 word within six of the other," and the other party said, "We
23 want the same word within ten of the other. Judge, what
24 should we do?" I said, "Okay. I'll pick. I don't care."
25 I mean, me picking search terms is a problem -- or not. I

1 mean, I can make up any words I want. But what's the most
2 efficient way for us to get that information? How do we do
3 that? Clearly "COFINA" is going to be too broad.

4 MR. KUEHN: Your Honor, we could sit down and go
5 through the list of search terms that we have previously
6 proposed with counsel for the government parties and agree
7 on a slightly more limited list which would, for example,
8 scratch "COFINA" and proceed from there. We could do that
9 right now.

10 THE COURT: Counsel?

11 MR. ROMANELLO: Your Honor, if I may, I've done
12 this in other cases where you take a custodian, your sample
13 custodian, you run the search terms, and then they provide
14 us the hit list. What term is generating 69,000 of the
15 70,000 terms? What can we do then to narrow that term?

16 And so it's just a disclosure. It's really a grid
17 that shows what term is generating all the hits. And that's
18 an easy way at the outset to understand you're getting a lot
19 of false positives on that date. So I would recommend
20 something along those lines.

21 Obviously, for someone whose e-mail address is
22 "COFINA," we can't put "COFINA" alone in that search because
23 it's going to come back with every document. But there's a
24 way to do it. We just have to share information on it and
25 come up with something that makes sense. You can't do it in

1 the abstract without knowing who the custodians are and what
2 search terms are generating the hit.

3 THE COURT: So I guess what I'm saying is that it
4 is going to be broader. It is going to involve some
5 electronic discovery. So I'm trying to figure out the most
6 efficient way to do it. The goal of the search is to
7 determine what use if any is to be made of the revenues.
8 Okay?

9 MR. FRIEDMANN: Your Honor, look, I think we're
10 also willing to look for external communications between
11 AAFAF or GDB and Banco Popular or some entities that, you
12 know, represent certain bondholders if we're given a list of
13 who those might be and see again how many hits come up. It
14 may be that AAFAF has a million hits with Banco Popular
15 because there's a really broad range of issues. But again,
16 that's something we're willing to do.

17 As to custodians, we do believe it's an enormous
18 intrusion on the governor to ask the governor to produce
19 e-mails and to have the governor's e-mail files searched. I
20 just think it's unwarranted in light of the fact that there
21 are other individuals who apparently we will be searching
22 specifically, you know, the head of AAFAF or the head of
23 GDB. I think it's an unwarranted and unfair intrusion on
24 the executive. I think his e-mails will categorically be
25 addressed by executive privilege and other communications.

1 I think -- in a dispute of this nature, I submit it seems
2 unprecedented to tax the governor with that responsibility,
3 and to take the time to work with the governor personally to
4 review his e-mails to the extent he has substantial e-mails
5 I think is an unfair burden on the governor.

6 MR. KIRPALANI: Your Honor, if I could, I have
7 been involved with searching for discovery of heads of
8 multibillion-dollar companies who have very similar concerns
9 about burden. They have a lot they're doing, and this is
10 burdensome. And usually the test, if I understand the law
11 correctly, is is there any scintilla of evidence that the
12 actual head of state was actually involved in the subject
13 matter, as opposed to they're just way up there. And this
14 governor has given an interview to Reuters within the last
15 seven days saying his proposal to the GO bondholders is
16 being misunderstood by the skeptics, which is I guess the
17 people sitting on this side of the courtroom. He's
18 personally involved in this issue.

19 So we're happy to work as narrowly as possible.
20 Nobody wants to know what the governor is doing on weekends
21 and things like that. We're talking about a narrow issue of
22 whether our client's pledged property was the subject of use
23 under the fiscal plan. And I think, as your Honor
24 articulated, that this individual has that information and
25 has been absolutely involved in those decisions.

1 THE COURT: All right. But it sounds to me like
2 what you're focusing on, though, is the governor's public
3 statements to third parties describing in some manner the
4 intent of the plans that are proposed.

5 MR. KIRPALANI: Or a directive to his subordinate
6 to fix the fiscal plan so that we get the sales and use tax
7 to be available to the Commonwealth.

8 THE COURT: Let's start off with limiting it.
9 Let's start off with limiting the governor to third-party
10 public statements, if you feel you need those. If you feel
11 you can get them elsewhere, do so. You can ask for those.
12 But then it will depend on, they need to understand the
13 potential custodians, and that's real. Because obviously if
14 there's a directive to somebody, you can get it from the
15 somebody, if you've got the right somebody.

16 So what kind of timeframe do we really need? I
17 want to get the search terms and the custodians done.

18 MR. FRIEDMANN: Your Honor, we'll work with the
19 Quinn Emanuel team on custodians. I think we've already
20 identified some. You know, a practical issue is turnover in
21 administrations. And so while we've identified a lot of
22 custodians, I don't know --

23 THE COURT: But we have a very limited timeframe
24 here, right? This is the 15th --

25 MR. FRIEDMANN: You're actually right, your Honor.

1 Thank you for reminding me of that. That might actually
2 reduce the number of custodians, because some of the
3 custodians who we identified were people within the two-year
4 timeframe who may have left. So we will refresh the list of
5 people who we believe could be relevant custodians. We'll
6 have that discussion with GDB and AAFAF hopefully later
7 today. Our door is open to communicate on search terms.
8 Given that -- you know, to the extent there's substantial
9 volume, obviously in the first instance we need to hire
10 Spanish-speaking attorneys to review them. And then --

11 THE COURT: Well, you have -- don't you have
12 Spanish-speaking attorneys?

13 MR. FRIEDMANN: We have a one-person local
14 counsel, your Honor. Literally his firm is one lawyer.

15 THE COURT: I'm just going to let that go.
16 There's silence in the courtroom. I don't know what to say
17 about that.

18 MR. FRIEDMANN: Hiring people, given the enormous
19 number of conflicts --

20 THE COURT: As I'm saying that, I'm hearing that.

21 MR. FRIEDMANN: It's extremely difficult, your
22 Honor. And AAFAF was not able to hire counsel -- counsel is
23 fantastic, but we were not able to hire a large firm, given
24 how late AAFAF got involved in the process compared to many
25 of the parties which have been here for years.

1 MR. KIRPALANI: What about the Oversight Board's
2 Puerto Rico counsel? Could you coordinate and use the same
3 counsel?

4 MR. FRIEDMANN: I don't know. I'd have to
5 consider whether that's appropriate, given that they
6 represent somebody else. We've already inquired as to the
7 process of temporary attorneys to do review. But I don't
8 think it's, to be honest, feasible for us to make July 22nd.
9 I'll be as candid as I can about that.

10 THE COURT: First of all, we'll deal with a
11 rolling production, so we'll see. But I think by week-end
12 we need to have the list -- I don't need to have it. They
13 need to, the Coalition needs to have the custodians and a
14 description of the custodians. The Coalition needs to
15 provide a realistic set of search terms that you want.
16 Okay?

17 I mean, look at it critically and see what you
18 think is reasonable or likely to come up with reasonable to
19 answer the very limited question that I'm allowing this
20 discovery on, which is what use, if any, is made of these
21 funds, of these revenues. Okay?

22 What do I do if there's a dispute? Do I need
23 to -- I don't want to have to have you all come in again.
24 This doesn't make sense to me.

25 MR. FRIEDMANN: Your Honor, Peter Friedmann from

1 O'Melveny. I guess if there is, can we submit very short
2 letters to your Honor and have a phone conference? Will
3 that be acceptable to your Honor?

4 THE COURT: It's acceptable to me. Is it
5 acceptable to everybody here who may not be party to that
6 conversation?

7 MR. FRIEDMANN: From my end --

8 THE COURT: I'm going to enter that as an order.
9 If anybody objects to it, I'll give you a few days to give
10 me an objection. But otherwise, I think the most practical
11 way to deal with this would be to deal with it by letter
12 with a telephone conference with only the interested
13 parties, and I'm dealing now with custodians and search
14 terms to accomplish the discovery that I've allowed. Okay.
15 Counsel?

16 MR. LEBLANC: Yes, your Honor. Andrew Leblanc
17 again with Ambac. I just want to be clear about -- our
18 concern is the limited scope that your Honor has just
19 announced. We do think -- we understand that there's a
20 dispute as to whether or not, the scope of the duty to
21 defend --

22 THE COURT: You're right, you're right.

23 MR. LEBLANC: And we believe that if the
24 government parties intend to take the position that if
25 they're wrong about the scope of the duty to defend, then

1 they aren't defending on that basis, in other words, they
2 have not complied with a duty to defend that is broader than
3 the duty to defend that they've just espoused, then that's
4 fine; we don't need the discovery. But we expect to the
5 extent that Judge Swain agrees with us, that the duty to
6 defend goes beyond answering a claim or complaint that's
7 filed and it has broader implications against an issue where
8 like the Commonwealth here, COFINA here, I should say, then
9 there is an obligation that goes beyond simply responding to
10 a claim or complaint that's filed.

11 Then we believe we're entitled to discovery, and
12 we think the search terms that were originally proposed --
13 obviously the modifications to adjust for an outsized number
14 of hits, things like that -- that we have reviewed those
15 terms and viewed them as sufficient to cover the additional
16 questions we have with respect to whether or not they've
17 complied with the duty to defend as opposed to simply
18 actually invading the COFINA collateral, the sales and use
19 tax.

20 THE COURT: Okay. I'm sorry. This is what
21 started right before we broke for lunch. So there was a
22 discussion that I did say we would resume about the scope of
23 that discovery, like who are the right parties that should
24 be in the words for that.

25 MR. LEBLANC: Yes, your Honor. And Mr. Kirpalani

1 earlier, he gave an example of something that would be
2 highly relevant to whether or not there was a duty to
3 defend. That is, if somebody at the Commonwealth had a
4 discussion with Banco Popular saying that we intend to
5 invade COFINA, we want your cooperation with it, there could
6 have been many other discussions. Or there could be
7 internal e-mails that could reflect somebody had a telephone
8 conversation with somebody saying I'm working on a way that
9 we can invade the COFINA sales and use tax. That would be
10 inconsistent with the duty to defend, in our view, as we
11 interpret that.

12 And that, to our mind, is what's going to be
13 adjudicated as part of this phase or this stage, I should
14 say, of the litigation. And limiting the discovery to
15 whether they have in fact invaded the collateral assumes
16 that the duty to defend doesn't have any -- doesn't impose
17 any obligations beyond simply don't invade the collateral.
18 We think that's an incorrect reading of it.

19 So we think the original search terms or something
20 closer to that with corrections for things that obviously
21 generate an inappropriate amount of hits is more
22 appropriate. And it's nothing to be done here. It's just
23 when the parties have their discussions about what the
24 appropriate set of search terms is, I expect if the topics
25 are as limited as your Honor just said, the government

1 parties are going to say we have two or three terms and
2 that's it. If it's more broadly, as we believe it should
3 be, then it's going to be a longer list of terms, it may or
4 may not yield a meaningful amount more. We just can't know
5 that until those terms are run. But I think we've said, our
6 side has said we'd work with them if that in fact occurs, if
7 there's an inappropriately large number of documents that
8 are returned.

9 We just don't think if we go into the weekend or
10 further discussions with the direction from the court that
11 it's limited to this one topic, I think we're going to have
12 a dispute that we'll need to come back to you very quickly
13 on or we'll have to be arguing to Judge Swain that we didn't
14 have the opportunity to take discovery sufficient to argue
15 the points that we have to argue for this stage too.

16 THE COURT: This is the size of Texas. Was that
17 the phrase? Thank you.

18 MR. CANTOR: I believe that was the inelegant
19 phrase that I used, your Honor. I'll be honest with you.
20 Maybe it's the lunch break. I'm not exactly following what
21 counsel is proposing to do differently other than what we've
22 been discussing except maybe he wants a longer list of
23 search terms. I guess we can agree to disagree what the
24 search terms are going to look like. We're sort of already
25 at that point anyways.

1 I think if we want to go back to the baseline
2 issue of whether the duty to defend, which is expressly in
3 the contract in the bond resolution phrased as the duty to
4 defend against a claim or demand, if that somehow -- if
5 we're going to discuss whether that somehow gives rise to
6 discovery of essentially everything that the government has
7 done in the hopes of finding something -- that's what I
8 thought I heard. Sounds like a fishing expedition to me,
9 quite frankly -- is they have no idea what happened or they
10 don't have an allegation of anything specifically happening,
11 but they want to make sure the search terms are broad enough
12 so that something they hadn't thought of previously might
13 get snapped up if in fact it exists. I don't know how
14 that's going to move the ball forward here.

15 THE COURT: So obviously of all the issues that
16 were briefed I didn't see this one front and center. But
17 anyway, I think where this gets limited is in the custodians
18 and in the search terms. Because I think anybody's random
19 thought of what they think should have happened to COFINA
20 and the structure is just not the issue in this case; nor
21 can you bring that case.

22 So I'm assuming that you're dealing with more
23 specific directions to entities or the bank or something
24 like that. So I'm expecting that to be actually quite a
25 limited -- I'm not going to preclude discovery on that

1 point, but you need to be focused in your questions, all
2 right? That's going to be a very limited area of
3 communications between specific -- you know, the custodian
4 and specific parties, something like that. Because it can't
5 be what everybody in the government thought about what maybe
6 should be happening with COFINA. That's a ridiculous
7 exercise. I understand that that's not what you want.

8 MR. LEBLANC: That's not what we want. To be
9 clear as I can possibly be, the reason I raised it is
10 because I have every confidence that had we left here with
11 your Honor saying that the topic was, only answer the
12 limited question of determining what use if any is to be
13 made of the money, that when we said we'd like to see
14 documents reflecting communications, we want to have search
15 terms for these limited set of custodians that would capture
16 documents that would reflect communications with third
17 parties, for example, or internal communications that
18 reflect discussions with third parties, that they would have
19 said no because it's beyond the scope of what the court
20 ordered.

21 I think all I'm asking for now, your Honor, and it
22 is a question of custodians and search terms, but all we're
23 asking for now is to be clear that the topics upon which we
24 can include search terms is beyond that one limited question
25 but also includes reasonable search terms to investigate

1 whether or not they've complied with a duty to defend.
2 That's the issue.

3 And we can we can deal with specifics as they
4 arise. But having -- the one limited topic that we talked
5 about, it gets to Mr. Friedmann's I'll just give you the
6 documents sufficient to show how we're using it, and
7 therefore I'll only show you whether or not we have in fact
8 invaded the collateral, not whether we've complied with our
9 duty to defend the structure.

10 THE COURT: The problem I'm having with -- I'm
11 recognizing that it needs to be broader than I've just
12 stated it. The problem I'm having is with the duty to
13 defend as being too broad. Here is my IT person.

14 MR. ROMANELLO: Your Honor, Salvatore Romanello.
15 That's the first time anyone has ever said that to me, an IT
16 person. On behalf of National, I think it's just the
17 language -- it's difficult to prove the duty to defend.
18 What we're concerned with is invading, right? So it's the
19 proposed use of the funds. It's a change of use of the
20 funds. All right? We are limiting the custodians. If
21 there are e-mails that come up with the search term -- with
22 the use of the search term that show proposed changes to the
23 use, those are the types of documents where we think, yeah,
24 there's an affirmative obligation to defend. You can
25 litigate that. But really, you have to protect the

1 structure, and you're not protecting the structure if you're
2 saying, Hey, let's use these funds for something else. And
3 that's what we think will come out of these narrow -- we
4 want to make sure that if we have a narrow search, those
5 types of e-mails are turned over.

6 THE COURT: So why wouldn't that be turned over in
7 connection with a description that says discovery concerning
8 proposed use of these funds?

9 MR. CANTOR: It sounds to me, your Honor, like
10 they could. This may not be their intent, but it sounds to
11 me that in trying to get where they're going, you end up
12 with random statements by people that have no meaning behind
13 them and certainly no force of law. I just -- the
14 correlation makes sense to me. I'm not sure where we go
15 with how they're trying to change it. I mean, is it anytime
16 anyone mentions a different use of those funds in any
17 context for any reason? I'm not saying I agree to that, but
18 at least I'd understand what they're saying.

19 MR. KIRPALANI: If I could try --

20 THE COURT: Well, we have different issues here of
21 what they would actually try to argue and what's an
22 appropriate scope of discovery, right? So if we've limited
23 the custodians to people with actual sort of authority over
24 something, then by definition you should have eliminated
25 sort of the fourth tier person who may have had a thought

1 with their friends.

2 MR. CANTOR: I guess what I'm concerned about,
3 your Honor, is, when you get to the process, in order to
4 capture the stuff they're looking for, it sounds to me like
5 you need to look for every e-mail that has "SUT" in it.
6 Right? And if we're going to search for that, are we -- and
7 it's not clear how the proposal works on this -- are we
8 going to first review and make sure that a document that has
9 "SUT" in it is in fact responsive to what they want, or are
10 we just turning over every document that hits on "SUT"?

11 THE COURT: So that concern I think gets addressed
12 in the context of if you do a run and the terms are just too
13 broad. Then you come back and you say, Look, I've got this
14 excessive number of hits here, this is crazy.

15 MR. CANTOR: Okay. I'm willing to go down that
16 path. But I think if you listen to what it is they're
17 hoping to find, they only find it if they look at every
18 document that has "SUT" in it. And the word "change," I
19 mean, is that limited --

20 THE COURT: Well, if that's going to be their
21 approach, it's not going to be an effective one.

22 MR. KIRPALANI: Your Honor, I don't know if we're
23 talking past each other on this side of the desks, but I
24 mean, it's pretty simple. I think your Honor hit it on the
25 head this morning. And Mr. LeBlanc has illuminated the

1 proper scope given what the real goal is, to determine what
2 the proposed use of the dedicated sales tax is, other than
3 for payment of the bonds issued by COFINA. So it may not be
4 that it's specifically earmarked for one particular thing.
5 We don't think there's such a document that says, We're
6 going to take this much of the cash from COFINA and use it
7 to pay X, Y, Z expense. It probably doesn't exist.

8 But the issue is -- and not to take the statement
9 out of context, but counsel for AAFAF just said, Well, if
10 the bondholders are asking if there's any changes to be
11 made, well, at least I kind of understand what they mean.
12 But yeah, that's exactly what we mean. This is a
13 securitization where cash comes in and cash goes out to
14 bondholders.

15 We have statements on the record by Mr. Sanchez
16 that says, We are going to change the way COFINA works under
17 the fiscal plan; it will no longer go to COFINA and COFINA's
18 bondholders; it will now be pooled. And we want to see
19 those statements in the proper context and how they fit with
20 the fiscal plan. I don't know why it's invasive.

21 THE COURT: I'm not sure we've broadened it. I
22 mean, I think the documents have to reflect the proposed use
23 of the dedicated sales tax revenues. That is the goal, all
24 right?

25 If the search terms that they propose are too

1 broad because it's any random thought, then you'll need to
2 tell me that. But I think the goal is the same. I agree
3 that they can't have this fantasy wish list of, you know,
4 what the janitor thought should be done with the funds. But
5 I don't think they're going to waste anybody's time on that.
6 If the search terms are too broad, we're going to have to
7 figure out a different way to get there. But I think the
8 issue is remaining the same. It's just sort of how are you
9 using the documents.

10 MR. LEBLANC: Your Honor, I think the issues
11 remain the same. It's frankly the same process we do in
12 every case in every --

13 THE COURT: But you have very little time here,
14 okay? So you start the case in the normal course of saying,
15 Here is our broadest search terms possible, and then you
16 tell me where that ends up. We don't have that luxury here.
17 And frankly it's a waste of money here, so let's not do it
18 that way.

19 You need to come up with a really well-thought-out
20 set of terms, all right? And limit it -- because what I'll
21 end up doing is just cut the number of custodians, and
22 you'll end up with not what you want. So you need to have a
23 very defined set of terms, a limited set of custodians. You
24 need to, by Friday -- what did I say, Friday -- provide the
25 description of the potential custodians. You need to

1 provide the list of search terms. It needs to be
2 well-thought-out. The next step will be I guess the
3 government filing something that says, Look, we have 40,000
4 hits on this one word and it just doesn't make any sense for
5 us to do that.

6 I don't know how else to do it, but that's the
7 limitation. I think we've narrowed the timeframe and we've
8 narrowed the scope of the appropriate issue, and now we need
9 to figure out how to get there. But that's a more technical
10 discussion than I know how to do from the bench right now.

11 MR. MUNGOVAN: Good afternoon, your Honor.
12 Timothy Mungovan from Proskauer for the Oversight Board.
13 Just to clarify with respect to Elias Sanchez, to understand
14 what we're talking about in terms of what we're seeking from
15 him, he's an ex officio member of the Oversight Board. He
16 was appointed by the governor. What we would propose and
17 what we understand the proposal to be is that there's not
18 going to be a search for documentation -- documentation
19 concerning his communications with the Board as an ex
20 officio member are not going to be subject to production.
21 To the extent that they are developed as part of the search
22 or they are located, we would object to the production of
23 those communications with the Board by Mr. Sanchez or
24 communications between Mr. Sanchez and the governor with
25 respect to deliberations at the Oversight Board on the issue

1 of the use of the monies.

2 THE COURT: Why would you object?

3 MR. MUNGOVAN: To the extent that, your Honor,
4 with respect to those communications, Mr. Sanchez may have
5 direct dealings with the Board and a member of the Board
6 during the period we'll call it March when the fiscal plan
7 was being developed, those certification determinations,
8 those e-mails may well relate to certification -- excuse
9 me -- determinations that we believe are off-limits from
10 discovery and are not relevant to the issues in this case.

11 What we're hearing about is a claim that the
12 government effectively or COFINA, the entity, did not defend
13 the COFINA structure; and communications with the Board
14 about what the Board may want to do with respect to a fiscal
15 plan are not part of the issues that are in the interpleader
16 proceeding.

17 THE COURT: Go ahead.

18 MR. KIRPALANI. If I may be heard on that, your
19 Honor, Susheel Kirpalani.

20 We talk about the Federal Oversight and Management
21 Board by focusing on the "F" in federal. Under PROMESA, the
22 Oversight Board -- and counsel for AAFAF was just discussing
23 this exact issue with me in the hallway during our meet and
24 confer. The Board is a component part of the territorial
25 government under the federal law. That's what it says, that

1 the Oversight Board will be appointed by Congress, but it
2 will actually have authority at the territory level, not at
3 the federal level, at the territory level.

4 So under PROMESA, it took over the right to
5 approve an overall budget and fiscal plan. It is that
6 fiscal plan that is what gives the force of law in this
7 courtroom. And so it's highly relevant if the Oversight
8 Board members are asking the representative of the
9 Commonwealth, I don't understand how you plan to implement
10 this plan, this fiscal plan you've proposed to us; where is
11 the money going to come from; and the answer goes back
12 across the transom, We're just going to take it from COFINA.

13 Under what Mr. Mungovan's proposal is, we'd never
14 see that document. It just doesn't make any sense. I'm not
15 sure what sort of overlord privilege is being certified
16 here, but it doesn't square with the role of the Oversight
17 Board.

18 THE COURT: I'm just having a hard time
19 understanding what the objection is. I apologize. But if
20 the documents are requested from the Oversight Board and
21 they produce them, you're saying that you have the right to
22 object to their production.

23 MR. MUNGOVAN: Not quite, your Honor. I apologize
24 if I wasn't clear.

25 My understanding is what we're talking about is a

1 search with respect to Mr. Sanchez, and Mr. Sanchez is an ex
2 officio member. With respect to the discussions and
3 deliberations that take place within the Board as part of
4 the certification process of the fiscal plan, under 106(e)
5 of PROMESA, we believe what they're effectively doing is
6 challenging a fiscal plan as a basis for their claim as part
7 of the interpleader proceeding. And by looking at the
8 certification determinations of the Board or Mr. Sanchez as
9 an ex officio member of the Board, in effect that's where we
10 are headed with respect to this interpleader proceeding.
11 They're going to be challenging the Board's certification
12 determinations with respect to the uses of the sales and use
13 tax proceeds. The fact --

14 THE COURT: So you're assuming that they're going
15 to find that the funds were not going to be used to pay the
16 bondholders; and what you're saying is, assuming that fact,
17 they still can't challenge because of PROMESA and that the
18 decision is unreviewable.

19 MR. MUNGOVAN: What I'm saying is that's actually
20 not part of this case but it's part of the case that either
21 they have brought or will bring as part of the Title III.

22 As a practical matter to what AAFAF counsel has
23 said, those issues are largely irrelevant. We are producing
24 or AAFAF is prepared to produce the documentation which
25 shows the proposed uses of the sales and use tax proceeds.

1 And my understanding is the documentation that is in a data
2 room that AAFAF has prepared has that information. And so
3 the discussions and deliberations within the Board about
4 what to do and how to do it are frankly irrelevant to the
5 issue of whether or not there has been a breach by COFINA or
6 the government in failing to defend under the resolution for
7 COFINA.

8 THE COURT: So why is this different than the
9 deliberative process claim that either will or will not be
10 made in connection with this production?

11 MR. MUNGOVAN: It's directly related, your Honor.

12 THE COURT: Okay. So it's covered somewhere?

13 MR. MUNGOVAN: I believe it is.

14 THE COURT: I mean, either the documents will be
15 produced because there's no claim of privilege because it's
16 post decision and it's factual, to simplify the process, to
17 simplify the privilege. I reserve the right to do all the
18 nuances as well.

19 MR. MUNGOVAN: That's right, your Honor. I would
20 also say one more thing. The ultimate decision about what
21 to do, you've said and I believe the term is "What happens,"
22 that's what you've said repeatedly, I believe. We don't
23 know yet what will actually happen. And part of what the
24 Oversight Board had proposed last week in connection with
25 the omnibus hearing is a process to determine what happens

1 with respect to, among other things, these sales and use tax
2 proceeds for COFINA. It is not clear yet what will happen,
3 and so we are really predecisional in some respects with
4 respect to the discussions that are ongoing concerning the
5 use of the sales and use tax proceeds, at least from the
6 perspective of the Oversight Board. Thank you.

7 THE COURT: So that it seems to me deals with
8 frankly the ultimate resolution of everything --

9 MR. MUNGOVAN: I agree with, your Honor.

10 THE COURT: -- which is the mediation part of this
11 or the ultimate conclusion. The issue that we have here is
12 whether the actions taken before these funds are actually
13 used constitute a default.

14 MR. MUNGOVAN: Your Honor, I agree with you, but
15 Mr. Sanchez sits in between the Board, if you will, and the
16 government. And all that I'm trying to do is distinguish
17 between those two roles. If he has made statements or taken
18 actions and he happens to -- he happens to be an ex officio
19 member of the Board but he is communicating with the
20 governor about what he and the governor want to do, from my
21 perspective that's an issue for AAFAF to decide as to
22 whether or not it's subject to the deliberative privilege or
23 not.

24 We at the Board are not taking a position
25 necessarily with respect to those communications. I'm

1 distinguishing those types of communications from his
2 communications with the Board in the development of the
3 fiscal plan, which isn't necessarily -- the Board is acting
4 as the Board. The Board isn't a party to this proceeding.
5 The Board is a non-party that has received a subpoena, as is
6 Mr. Sanchez. I don't know if he's a party. I haven't gone
7 back and looked at the pleadings, your Honor, but I do know
8 that he's received a subpoena, so I assume that he's not a
9 party per se to the interpleader proceeding.

10 THE COURT: So I have a memory that this morning
11 you said, that you indicated that you had some
12 decisionmaking about going against Mr. Sanchez's -- seeking
13 Mr. Sanchez's documents and various roles. Did you say
14 something like that?

15 MR. KUEHN: Correct. Mr. Sanchez is appointed by
16 the governor, appointed by the government of Puerto Rico.
17 And while he's an ex officio member of the Board, he also
18 has a role with the government, as I understand it. And
19 they've taken the position in the past that he is a member
20 of the government, at least for purposes of deliberative
21 process privilege, and I don't see why we should treat it
22 any differently for purposes of discovery here.

23 THE COURT: So maybe it is the post-lunch and I
24 shouldn't do this, but it seems to me that those concerns
25 will be addressed in a claim of privilege, if appropriate,

1 okay? And you can assert that -- I mean, you can work with
2 counsel on that.

3 MR. MUNGOVAN: I agree, your Honor. Thank you. I
4 just wanted to make it clear that there wasn't any waiver on
5 the Board's part with respect to that issue. Thank you.

6 THE COURT: Okay. Thank you.

7 I hate to ask if there's anything else because
8 that always opens the door.

9 MR. KUEHN: I have one hopefully small request for
10 a little bit of guidance. And that is, we've talked about
11 e-mails. Another form of electronically stored information
12 is text messages. And in this case I have personal
13 knowledge that members of the governor of Puerto Rico used
14 text messages for business purposes.

15 To the extent that counsel for the government
16 parties is able to stipulate and represent to the court that
17 their personal text messages, their phones have not been
18 used for business purposes, I don't need to get into seeing
19 text messages. But I'm not sure if that's possible for them
20 to do. And to the extent it's not possible, I do think
21 that's important. I don't think there's any personal iPhone
22 privilege. And to the extent you're using that for your
23 business purpose, government purpose, I think that's
24 relevant and really should be part of the production.

25 MR. CANTOR: Your Honor, we believe it's -- there

1 are all the practical burden issues that we talked about in
2 addition to it just being a huge invasion of privacy here.

3 You know, I don't know which if any of these
4 officials do use their own phone text messages for
5 government business. But the process of recovering that
6 stuff and reviewing it to find whatever there may be out
7 there is just both burdensome and as I said a huge
8 imposition on these individuals' privacy rights, quite
9 frankly.

10 THE COURT: All right. So we need to get the list
11 of custodians out fast. Do you have any kind of standstill,
12 you know -- I don't mean standstill -- preservation orders
13 out or agreements on any of this?

14 MR. FRIEDMANN: Peter Friedmann from O'Melveny.
15 Your Honor, we have certainly worked with various clients --

16 THE COURT: I think you need to talk into the
17 microphone.

18 MR. FRIEDMANN: Peter Friedmann from O'Melveny.

19 Yes, your Honor, we have sent preservation notices
20 to people who received subpoenas. AAFAF has been under a
21 subpoena -- sorry -- under a document preservation notice,
22 GDB has preservation notices. That's already been done well
23 in advance of today's hearing.

24 THE COURT: All right. So I think the way -- the
25 only way I know how to do this is step by step but baby

1 step -- rapid steps.

2 So if there is no exemption from private
3 communications that I'm aware of, if it's unduly burdensome
4 given what he's -- what the ultimate search looks like, then
5 we'll deal with it. You need to categorize it, though. You
6 need to be able to say it to me, These ten people use their
7 phones, or these three custodians use their phones, and we
8 can't search for it. You know, I mean, texts it seems to
9 me -- I have no idea. In my e-mail box, the texts are
10 easier to find than the e-mails, but I don't know that I use
11 my equipment, you know, electronics the same way as
12 everybody else does.

13 But I think the problem with this all or nothing
14 is that we end up talking about things that don't have
15 definition, and we're past that stage. The litigation is
16 past that stage.

17 So if documents are being withheld, I've already
18 said that you can categorize the types of privileges you're
19 claiming. You can categorize sort of attorney-client, but
20 you've got to identify who it is. And if you're not
21 producing a certain type of document for a reason, you need
22 to say so, and then we can have a fight about it.

23 MR. CANTOR: We hear you, your Honor, and we'll do
24 that. I think your last comment raises, I apologize,
25 another potential issue, which, at least as I understand the

1 proposal in the hallway but I'm not sure how it was
2 communicated in the room, at least I don't recall it, is the
3 issue of privilege logs. And I thought that the proposal
4 had been that we were going to run a filter, one of the
5 filters we were going to run on the e-mails was to try and
6 eliminate communications involving counsel. Do I have that
7 correct?

8 MR. KUEHN: Correct.

9 MR. CANTOR: Okay. If we're eliminating them at
10 the search stage, then I don't know how we do a detailed
11 privilege log, if we're kicking them out and not recovering
12 them.

13 MR. KUEHN: I don't think we're asking for a
14 line-by-line privilege log. I think we're asking for a
15 categorical privilege log, which can be performed once you
16 isolate the potentially privileged documents by setting up
17 the date range that particular topics cover.

18 MR. CANTOR: Then there's really no advantage --
19 what was the advantage to the screen? Because I'm still
20 going to have to go back and look at all those documents
21 anyways.

22 MR. KUEHN: No. You can search by the names of
23 the attorneys on each side and say, Here is the subject
24 matter of the stream of communications from Attorney X to
25 Client Y over X dates.

1 MR. CANTOR: Okay. I guess, like I said, I'm not
2 sure -- one of the proposals for why this wasn't so bad was
3 that you can kick out all the attorney-client stuff ahead of
4 time -- and tell me where I'm wrong, because I know I can be
5 wrong. Don't I then have to go back and look at all the
6 attorney-client communications in order to come up with a
7 log?

8 MR. KUEHN: You can categorize them electrically.
9 Again, you can come up with search terms to categorize your
10 withheld documents and give us some idea the categories of
11 what's being addressed in those communications.

12 THE COURT: So instead of it doing it document by
13 document first, screen them out. Then how about by either
14 affidavit or some form of agreed-upon narrative that says,
15 This attorney was involved in these kinds of issues; this
16 attorney was involved in those kind of issues. To the
17 extent that -- like you would do it on a privilege log as a
18 subject but without doing it item by item at all. Just so
19 that they have a list of the attorneys and that they have
20 sort of a very broad -- you know, they were the ones that we
21 got compliance data from or something.

22 MR. CANTOR: I guess the answer is yes, we'll try.
23 I'm not positive this won't be a problem, but we will try.

24 THE COURT: All right. I'll go with trying to
25 start.

1 MR. CANTOR: Okay.

2 THE COURT: Then we have to succeed. Okay? What
3 kind of timeline do we need?

4 MS. HALSTEAD: Your Honor, I have one -- Ellen
5 Halstead of Cadwalader, Wickersham & Taft. We represent
6 Assured Guaranty. Assured insures the subordinate bonds.
7 You've been hearing from the Senior bondholders as well as
8 senior insurers all day. We did, Assure did propound
9 discovery requests upon COFINA. COFINA's response to those
10 requests was that they'll produce but they will only produce
11 hard copies.

12 We would just ask to the extent there's meet and
13 confers regarding search terms and the custodians this week
14 that we be included in those meet and confers. Because I
15 believe the document requests that we propounded on COFINA
16 would include what your Honor has ordered to be produced,
17 the proposed use of the sales tax revenues, that that would
18 be a subset of what we requested.

19 MR. CANTOR: Its sounds to me like it's between
20 the seniors and subs, not between us and them.

21 MS. HALSTEAD: Well, I think it is between us
22 because we propounded the discovery requests on COFINA. So
23 we're just asking that we be involved, that we be -- I
24 haven't seen a list of the search terms or proposed
25 custodians. We just ask to be involved in those

1 communications because it's possible we may want to add one
2 or two search terms to cover our issues. I don't know
3 that -- we may not be -- we're not trying to broaden the
4 scope of discovery in any sense. We do have concern that
5 discovery is all going to Seniors right now. What we
6 request is to be involved in these discussions, that's all.

7 THE COURT: All right. But I don't see a
8 different issue right now between the levels as far as the
9 scope of discovery. So I mean, the scope of discovery here
10 is what is the proposed use -- proposed changes to use of
11 dedicated sales tax funds, right?

12 MS. HALSTEAD: We just involved --

13 THE COURT: I have no problem with you consulting
14 with this, but I don't want to make this into a 12-party
15 need to exchange. So you need to work with the Seniors and
16 decide among yourselves that you can include those words or
17 not. I don't want COFINA to have too many people to respond
18 to.

19 MS. HALSTEAD: Okay. That's fine. Thank you,
20 your Honor.

21 THE COURT: So the exchange of custodians and
22 search terms is going to be done by the end of the week, and
23 everybody's going to really show how much control I have
24 over this courtroom by really, really working hard to make
25 them very limited search terms, right? Everybody's just

1 staring -- for the record, everyone is just staring at me in
2 horror.

3 Okay. But then what happens? If you can't by the
4 end -- by next week, next Thursday, you send me letters that
5 say we have a problem or not. Then I'll set up a telephone
6 conference. And I will put in this order that if anybody
7 objects to me having a private telephone conference just
8 over the search terms and the custodians, they need to file
9 something within the next four days or something like that.
10 I'll figure that out. Okay?

11 MR. CANTOR: Letters by the 13th, that's next --

12 THE COURT: Is that Friday the 13th?

13 MR. CANTOR: Thursday.

14 THE COURT: Thursday, yeah.

15 MR. GRAY: Your Honor, Neil Gray from Reed Smith
16 on behalf of the Bank of New York Mellon.

17 Two small points. We're interpreting your earlier
18 ruling that February 15, 2017 will be the starting time for
19 these productions, that that applies to all parties. Are we
20 interpreting that correctly? All parties producing
21 documents.

22 THE COURT: I think that makes the most sense.
23 But I leave it to you because I have left open the 2015 door
24 for, you know, post this proceeding, I leave it to you on
25 whether or not it's cheaper for you to do it all at once if

1 you want to go back to 2015 now because I know you've
2 reached agreements on some of those things. If that's
3 easier, you're certainly free to do it. But otherwise the
4 discovery here is limited. I think I have two separate
5 dates, actually. I think I have the March 17 for the --
6 right?

7 MR. KUEHN: I'm sorry, your Honor.

8 THE COURT: I'm sorry. I lost track of my dates.

9 MR. LEBLANC: I think February 15 --

10 THE COURT: I think February 15 for the government
11 forward.

12 MR. KIRPALANI: March 13, the date of the public
13 fiscal plan for creditor reactions to it.

14 THE COURT: Does everybody agree that I had those
15 two dates?

16 MR. KUEHN: Agreed.

17 THE COURT: So yes, I believe that even if other
18 parties have agreed to go earlier, they don't need to,
19 including the bank, I gather was going to produce earlier,
20 that you don't need to. It's without waiver of bringing in
21 the claims of dispute potential defaults preceding 2017
22 either in phase three or as an interim stage after the
23 summary judgments in the stage two.

24 MR. GRAY: Thank you, your Honor. The second
25 point, and this is more informative than anything, many of

1 the parties in their responses and objections asserted the
2 need for a protective order to produce confidential
3 information. We wanted to let the court know that
4 negotiations about that language have been going on. We're
5 hopeful that we'll be able to finalize that in the next day
6 or so, day or two, and get a signed stipulation to the court
7 to consider and so order, my preference would be by the end
8 of the week so it doesn't hold up any productions. But
9 again, that's more informative than anything. I don't think
10 we need anything from the court at this time.

11 THE COURT: Okay. If you all agree I will not
12 have an objection to it. I don't feel the need to insert
13 anything else unless you've really tied the hands of the
14 court somehow.

15 MR. GRAY: Thank you, your Honor.

16 MR. KUEHN: Your Honor, Brant Kuehn.

17 I had two small requests or two small suggestions
18 with respect to the search term and custodian meet and
19 confer process. It's difficult to efficiently propose
20 search terms until we know the custodians. So I think it
21 may be more productive if the custodian list is produced
22 tomorrow, if possible, or Friday morning, and we are then
23 able to spend a few hours at least to look over the
24 custodians and develop the search terms after we've seen the
25 custodians.

1 MR. CANTOR: I think we can give you a large
2 number of the custodians perhaps even tonight but certainly
3 tomorrow. I will be quite frank, the number 40 I'm not sure
4 is as set in stone as people thought it was. So, you know,
5 I need to know when we get to that number. But I've got 20
6 at least we can get you.

7 MR. KUEHN: Thank you. The second suggestion is,
8 given the looming deadline, I wonder if it would make more
9 sense to have letters addressing any disputes next Wednesday
10 rather than next Thursday, if there are any objections.

11 MR. CANTOR: Sure.

12 THE COURT: Sure. Fine.

13 I will deal with them as promptly as I can. And
14 again, if we can do it in a smaller telephone conference,
15 that would be the easiest, but we'll see if we have any
16 objections to that procedure.

17 I feel like I probably have something else hanging
18 out there?

19 MR. DESPINS: Your Honor, Luc Despins with Paul
20 Hastings, proposed counsel for the Creditors Committee in
21 the Commonwealth case. I just wanted to make sure your
22 Honor was not blindsided about an issue. It doesn't affect
23 any of the rulings you've made today.

24 THE COURT: I think I'm doing so well on these
25 issues, and you keep kind of bringing them in.

1 MR. DESPINS: It's just, I want to make sure your
2 Honor knows that right now you've been dealing with
3 discovery issues within COFINA which affect the issue of who
4 is Senior, is there a default, do the Seniors get all the
5 money, et cetera, et cetera. But there's a bigger issue
6 that involves the Commonwealth v. COFINA which is coming
7 down I would say soon over whether this is COFINA's money at
8 all.

9 People don't need to comment, obviously, but we
10 are going to represent the Commonwealth in that issue, and
11 therefore I want to make sure your Honor knew that that
12 train is coming, which doesn't affect anything that has
13 happened today, but I wanted to make sure you were aware of
14 that.

15 THE COURT: Thank you. So as you know, the order
16 of reference was limited here. There will be other orders
17 of reference to this session. I do coordinate the schedule
18 with Judge Swain, working within those things. So we have
19 her schedule. That's not been modified at all, and she's
20 set schedules in various of the proceedings, and we just try
21 to work within those.

22 I do ask you, though, if you think I'm running
23 against a date that I lost track of in another matter, you
24 know, please let me know, because I know that you're all
25 more involved in all of the other proceedings than I am, but

1 I'm sure that will continue to evolve over time.

2 All right. I think that ends it for me. Anybody
3 have any other issues that they want to talk about? The
4 weather? No. Okay. Thank you very much.

5 (Adjourned, 2:34 p.m.)
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Dated this 6th day of July, 2017.

/s/ Lee A. Marzilli

Lee A. Marzilli, RPR, CRR
Official Court Reporter

/s/ Kelly Mortellite

Kelly Mortellite, RMR, CRR
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